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CASES DETERMINED
BY THE
SUPREME COURT
OF THE
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Between July 11, 1921, and August 1, 1921.

PERRY S. RADER,
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JUDGES OF THE SUPREME COURT

DURING THE TIME OF THESE REPORTS.

HON. JAMES T. BLIAR, Chief Justice.
HON. ROBERT FRANKLIN WALKER, Judge.
HON. ARCHELAUS M. WOODSON, Judge.
HON. WALLER W. GRAVES, Judge.
HON. EDWARD HIGBEE, Judge.
HON. DAVID E. BLAIR, Judge.
HON. CONWAY ELDER, Judge.

JESSE W. BARRETT, Attorney-General,
J. D. ALLEN, Clerk.
H. C. SCHULT, Marshal.

JUDGES OF THE SUPREME COURT

BY DIVISIONS.

DIVISION ONE.

HON. ARCHELAUS M. WOODSON, Presiding Judge.

HON. JAMES T. BLAIR, Judge.

HON. WALLER W. GRAVES, Judge.

HON. CONWAY ELDER, Judge.

HON. STEPHEN S. BROWN, Commissioner.

HON. WILLIAM T. RAGLAND, Commissioner.

HON. CHARLES EDWIN SMALL, Commissioner.

DIVISION TWO.

HON. EDWARD HIGBEE, Presiding Judge.

HON. ROBERT FRANKLIN WALKER, Judge.

HON. DAVID E. BLAIR, Judge.

HON. NORMAN A. MOZLEY, Commissioner.

HON. ROBERT T. RAILEY, Commissioner.

HON. JOHN TURNER WHITE, Commissioner.

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CASES ARGUED AND DETERMINED
BY THE
SUPREME COURT
OF THE
STATE OF MISSOURI
AT THE
APRIL TERM, 1921

(Continued from Volume 288.)

ALLIE DENNIS et al., Appellants, v. W. H. GORMAN.

Division One, July 11, 1921.

1. **HOMESTEAD ACT: Liberally Construed.** The homestead laws create a special statutory estate not governed by the general laws of descent and distribution. Their purpose was to afford a safe anchorage for a man and his wife and children against financial stress and storm, and accordingly are to be liberally construed in their favor and against creditors. But they cannot be construed beyond their evident intent.
2. **HOMESTEAD: By What Law Fixed.** The rights of the widow and children and of the creditors in the householder's homestead are fixed and determined by the law in force at the time of his death. Where he died October 15, 1907, the rights of his widow, children, grandchildren and creditors were fixed by the Act of 1907, which is the same as Section 6708, Revised Statutes 1909.
3. ———: **Sale by Probate Court: Collateral Attack.** Under the Homestead Act of 1895 (Sec. 3620, R. S. 1899) and the Homestead Act of 1907 (Sec. 6708, R. S. 1909), the probate court had no jurisdiction to order the homestead of a deceased householder to be sold to pay his debts not legally charged thereon in his lifetime, where
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he left a wife and surviving children; but such a sale was an absolute nullity and void, and being such it can be nullified in a collateral proceeding.

4. ———: ———: **Act of 1907.** The Homestead Act of 1907 (Sec. 6708, R. S. 1909) gave to the probate court no more jurisdiction to order the sale of the homestead of a deceased householder who left children him surviving than did the Act of 1895 (Sec. 3620, R. S. 1899). By the said Act of 1907, it is only in case the heirs of the husband "be persons other than his children" that the probate court has power or jurisdiction to order the sale of his homestead to pay debts not legally charged thereon in his lifetime. Not even when one of his heirs is a grandchild, there being children, can the homestead be sold; for the Act of 1907 means that it is only in case all the husband's heirs are "persons other than his children" that his homestead can be sold to pay his debts not expressly charged thereon in his lifetime.
5. ———: **Abandonment By Wife and Children: Sale to Pay Debts.** The fact that the widow and children left the homestead and moved to another county after the homesteader's death did not increase the jurisdiction of the probate court to order it sold to pay his debts not expressly charged thereon in his lifetime. The rights of his children become vested in them as remaindermen in fee upon his death, and there is nothing in the statute requiring them to continue to reside on the property or forfeit their title.
6. ———: **Grandchild: Right to Fee.** The householder having died leaving two children, one of them a minor, and a grandchild, and the statute saying that the homestead cannot be sold to pay debts if the heirs of the husband were "persons other than his children," the attempted sale of the homestead under orders of the probate court was void, not only as to the two children, but as to the grandchild as well.
7. ———: **Sale: Estoppel.** Where the children knew nothing of the administratrix's sale of the homestead, ordered by the probate court to pay decedent's debts, and received none of the proceeds, and the widow refused, as administratrix, to file a petition for its sale and it was filed by the creditors because of her refusal, the children are in no sense estopped to recover the homestead property, even though one of them was twenty-two years old at the time of her father's death, and the other twenty-two when the sale was made.
8. ———: **Conveyance by Widow: Quarantine.** A quit-claim deed by the widow of a deceased homesteader conveyed all her rights

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therein, whether of homestead, dower or quarantine, and his children who had reached their majority continued to own the fee subject to the rights conveyed to her grantee. And if her homestead right has been extinguished by remarriage, the right to possession by the children, the youngest having become of legal age, is subject to the former widow's unassigned dower.

9. ———: **Grandchild: Right to Occupancy.** The minor grandchild of the deceased householder does not have the right of occupancy of his homestead jointly with his widow and children, even though she had been residing with him as a member of his family, her parents being dead. The right of occupancy is given by statute only to minor children of the householder, and that right ceases when the youngest reaches twenty-one years of age. But such grandchild has a remainder in fee in the homestead property as an heir of the homesteader.
10. ———: **Conveyance by Widow: Occupancy by Children: Unassigned Dower.** The right of the deceased householder's children to occupy his homestead, under the Act of 1907, ceased when the youngest of them reached twenty-one years of age, and where the youngest had reached that age at the time the widow conveyed her right and interests in the homestead, and she has since married, she no longer has a homestead right; but her grantee acquired her right of dower and quarantine until dower is assigned, and although the children are owners in fee their right to possession, the younger having reached legal age, is subject to the dower and quarantine of the former widow until dower is assigned.

Appeal from Wright Circuit Court.—*Hon. C. H. Skinker*,
Judge.

AFFIRMED (*in part*); **REVERSED AND REMANDED** (*in part*,
with directions).

George W. Goad for appellants.

(1) Under the homestead law of 1895 the homestead tract could not be sold by the administrator of the deceased householder to pay the general debts of his estate. *Broyles v. Cox*, 153 Mo. 242; *In re Powell's Estate*, 157 Mo. 151; *Kenne v. Wyatt*, 160 Mo. 1; *Balance v. Gordon*, 247 Mo. 119; *Armor v. Lewis*, 252 Mo. 568; *Ehlers v. Potter*, 219 S. W. 915. (2) Under the home-

stead law of 1895 the homestead tract could not be sold to pay the general debts of the deceased householder, even after the death or remarriage of the widow, and the majority of the minor children, in which event the homestead tract passed in fee to the heirs of such deceased householder free from debts not charged thereon in his lifetime. *Street v. McCune*, 148 Mo. App. 700; *New Madrid Banking Co. v. Brown*, 165 Mo. 39; *Balance v. Gordon*, 247 Mo. 119; *Armor v. Lewis*, 252 Mo. 568; *Ehlers v. Potter*, 219 S. W. 915. (3) The homestead law of 1895 was amended in 1907 by adding thereto a specific prohibition against the sale of the homestead tract for payment of the debts of the deceased householder, unless such debts were charged thereon during his lifetime, which amendment was a complete recognition and adoption of the construction of the court of the 1895 law, and applies to the case at bar. *R. S. 1909*, sec. 6708. (4) The probate court was without jurisdiction in ordering and approving said sale. Such orders were not final judgments. The sale was void, no title passed thereby and is open to attack in this proceeding. *Balance v. Gordon*, 247 Mo. 119; *Armor v. Lewis*, 252 Mo. 568; *Ehlers v. Potter*, 219 S. W. 915. (5) The homestead rights of the children cannot be impaired by abandonment by the widow. *Phillips v. Preson*, 172 Mo. 24. (6) The word "children" as used in the 1895 homestead law and the 1907 amendment should be construed to include grandchildren, especially as in this case, where the grandchild is an orphan, lived with, was supported by and a member of the family of the deceased householder. *Werne v. Large*, 258 Mo. 163; *Kenney v. McVoy*, 206 Mo. 42; *Moran v. Stewart*, 122 Mo. 295; *In re Williams Estate*, 62 Mo. App. 339.

J. W. Jackson and Lamar & Lamar for respondent.

(1) At the time of the sale the widow had conveyed her right by deed, had moved to Springfield and

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established a home. The two children were both of age, the oldest twenty-eight and the youngest twenty-two, at the date of the sale. The grandchild, Leon England, is not a beneficiary of this homestead statute. (a) "Children" as used in the statute providing for a homestead for the widow and children, does not include "grandchildren," although such grandchild may have been supported by the decedent as part of his family. 11 C. J. 751 (2) B; 21 Cyc. 569, sec. 2, note 49; Peeler v. Peeler, 68 Miss. 141; Wilkins v. Briggs, 48 Tex. Civ. App. 598, 107 S. W. 140; Clements v. McKa, 110 S. W. 185; Brown v. Brown, 104 Ark. 313, 149 S. W. 330. (b) The word 'children' both in the popular and in the technical sense means descendants in the first degree, and does not include "grandchildren." 1 Boutvier's Law Dictionary on "Children" (15 Ed.) p. 310; Von Behrn v. Stoeppelmann, 226 S. E. 875; Lich v. Lich, 158 Mo. App. 413; Starrett v. McKim, 119 S. W. (Ark.) 824; Walker v. Vicksburg Ry. Co., 34 So. 749; Thomas v. Thomas, 53 So. (Miss.) 633; Palmer v. Horn, 84 N. Y. 516; Walter v. Truslow, 35 N. E. 955; Brown v. Brown, 98 N. W. (Neb.) 718. (c) Not only is the benefit of a homestead statute limited to children as thus defined—that is, descendants in the first degree—but the benefits of homestead to such children is not extended after majority, by reason of such child after majority being a dependant female or an imbecile. 21 Cyc. 586, notes 64 and 65. (2) At the time of the execution of the deed by the widow on April 8, 1913, both the children were more than twenty-one years of age, the youngest being then twenty-two. If the widow had any homestead, she had a perfect right to sell and convey such homestead, and by such deed this right passed to respondent Gorman, the grantee in such deed. Mark v. Heiss, 90 Mo. 578; Phillips v. Pearson, 172 Mo. 28. (3) Having conveyed her homestead, if she had any, to respondent before the administrator's sale, and the children being of age, there was no homestead when the land sold.

There being no person entitled to homestead in the premises at the time this action was filed or at the time of the sale, no cause of action existed in favor of any person. *Wilson v. Wilson*, 255 Mo. 535; *Denk v. Fiel*, 249 Ill. 424; *Londen v. Martindale*, 67 N. W. 133. (4) Judgments of probate courts in administration matters are entitled to all the presumptions that attach to judgments of courts of general jurisdiction. One who is a party to an action in the probate court in which the right of homestead is available as a defense must interpose this defense, and if he fails to do so, the judgment rendered in such suit will bar his subsequent assertion of such right. 21 Cyc. 619; *Wilson v. Wilson*, 255 Mo. 528, 536; 18 Cyc. 797; *Smith v. Black*, 231 Mo. 690; *McDonald v. McDonald*, 242 Mo. 176; *Desloge v. Tucker*, 196 Mo. 587, 601; *Higbee v. Bank*, 244 Mo. 411, 424; *Harter v. Petty*, 266 Mo. 296, 303; *Robbins v. Boulware*, 190 Mo. 51; *Covington v. Chamberlin*, 156 Mo. 574; *Sigmond v. Bebbler*, 73 N. W. (Ia.) 1027; *Doran v. Kennedy*, 141 N. W. (Minn.) 851; *Doran v. Kennedy*, 237 U. S. 362; *Stone v. Elliott*, 106 N. E. (Ind.) 710; *Reinhart v. Seaman*, 69 N. E. 847; *Jarrell v. Cole*, 215 Fed. 315. (5) The filing of a proper petition gives the probate court jurisdiction of the land, and notice to the parties in interest gives jurisdiction of the person. *Grayson v. Weddle*, 63 Mo. 523, 537; *Pattel v. Thomas*, 58 Mo. 163, 173; *Overton v. Johnson*, 17 Mo. 442, 450. (6) Administrator's sales (and all judicial sales for that matter) will be liberally construed. *Tutt v. Boyer*, 51 Mo. 425, 430; *Thompson v. Pinell*, 199 S. E. 1012; *Noland v. Barrett*, 122 Mo. 181, 190. (7) In order for a judicial sale to be subject to collateral attack, as sought in this case, the lack of jurisdiction must appear from the face of the record. *Covington v. Chamberlin*, 156 Mo. 574; *Robbins v. Boulware*, 190 Mo. 33, 52. (8) It will not be disputed that an appeal lies both from the judgment of the probate court, ordering the sale of the land, and from the final judgment approving the sale. *Desloge*

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v. Tucker, 196 Mo. 587; Tutt v. Boyer, 51 Mo. 425, 430; Thompson v. Pinell, 199 S. W. 1011; Price v. Realty Assn., 101 Mo. 107, 118; Rogers v. Johnson, 125 Mo. 202, 215; 18 Cyc. 794.

SMALL, C.—Appeal from the Circuit Court of Wright County. Suit to quiet title to ninety-five acres of land in said county. The petition is in the regular form to quiet title at law; it also contains a second count in ejectment.

The answer, besides a general denial, after admitting possession and claim of ownership, sets up that defendant purchased the property at a sale made by the administratrix of the estate of George Manear at the February term, 1913, of the probate court of said county, to pay the debts of the deceased, under due and regular orders and proceedings after due notice to all parties interested in said estate, including plaintiffs, who were personally served with notice of such proceedings by the sheriff as required by law. That at such sale the defendant was the highest and best bidder and purchased the property for \$880, which he paid to the administratrix and received a regular administratrix's deed therefor. That said sale was duly confirmed and is binding upon the plaintiffs as *res adjudicata*, and the orders and judgment of said court are pleaded in bar of all claims of the plaintiffs. It is further alleged, by way of estoppel, that the said estate received the benefit of the money paid by defendant, and defendant afterwards took possession and made valuable improvements upon said land with the knowledge and consent of plaintiffs.

The reply put the allegations of the answer in issue.

There is substantially no dispute as to the salient facts. The plaintiffs, Allie Dennis and Marie Hearold, are the children, and the minor plaintiff, Leon England, is the grandchild, and they constitute the only heirs of George Manear, who died October 15, 1907. At and

a number of years before his death, he was the owner of the land and occupied it with his family as a homestead. It did not exceed \$1500 in value. His family, when he died, consisted of the plaintiffs, and his wife, Laura Manear. The widow was appointed administratrix in 1908, but failing and refusing to apply for and procure an order of sale to pay debts proved up against the estate, the creditors filed such petition, and after the order of sale was made in 1911 and renewed for several terms, the property was sold at the February term, 1913, and defendant became the purchaser. The proceedings were all regular, in the usual form for the sale of real estate of the deceased to pay his debts. The plaintiffs did not appear at any stage of the proceedings or take any notice thereof. The debts for which the land was sold were not charged against it in the lifetime of the decedent, and were not contracted before the homestead was acquired. About a year before the sale, or in 1912, the widow and two daughters and granddaughter, who up to that time continued to reside on the homestead, removed to Springfield, Missouri, where they resided at the time of the sale. The children and grandchild received none of the proceeds of the sale, so far as shown by the evidence, and had no knowledge of its occurrence. But \$250 of such proceeds was paid "back on the land," by the administratrix. Just before the sale, the widow by quit-claim deed, dated April 8, 1913, sold and conveyed all her interest in the property to the defendant for \$1,160. At the time of their father's death, one of his daughters was twenty-two years of age, the other sixteen; and said grandchild was an infant of tender years and was a minor when this suit was brought. The widow, in testifying, said her name was Laura Hendricks, at the time she testified.

The lower court found the issues for the defendant on both counts of the petition, and refusing a new trial, the plaintiffs brought the case here by appeal.

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The principal question on this appeal submitted by counsel on both sides, is whether, on the foregoing facts, the said administratrix's sale was absolutely void and subject to collateral attack. There are some minor questions also which will be noticed in the opinion.

I. Our homestead laws create an estate unknown to the common law. It is a special statutory estate not governed by the general laws of descent and distribution. The purpose of such legislation was to afford a safe harbor and anchorage for a man and his wife and children against financial stress and storm, and is accordingly to be liberally construed in their favor and against creditors to promote its beneficent purpose. [Balance v. Gordon, 247 Mo. l. c. 124.]

**Sale of
Homestead:
Act of 1895:
Collateral
Attack.**

The law in this State was first enacted in 1862 (Laws 1862-3, p. 22), and changed from time to time since its first enactment. The various statutes and the history of the Homestead Act have been so repeatedly set out in the decisions of this court that it is sufficient for us to refer to the statutes on the subject directly bearing upon and governing this case. Section 2 of the Homestead Act of 1895 (Acts 1895, p. 185) being afterwards incorporated in Revised Statutes 1899, as Section 3620, was as follows:

“If any such housekeeper or head of a family shall die leaving a widow or any minor children, his homestead to the value aforesaid shall pass to and vest in such widow or children, or if there be both, to such widow and children, and shall continue for their benefit without being subject to the payment of the debts of the deceased, unless legally charged thereon in his lifetime, until the youngest child shall attain its legal majority and until the death of such widow; that is to say, the children shall have the joint right of occupation with the widow until they shall arrive at their majority, and the widow shall have the right to occupy such homestead

during her life or widowhood, and upon her death or remarriage it shall pass to the heirs of the husband; and the probate court having jurisdiction of the estate of the deceased housekeeper, or head of a family, shall, when necessary, appoint three commissioners to set out such homestead to the person or persons entitled thereto. [R. S. 1889, sec. 5439, Amended Laws 1895, p. 185-c.]”

Said Section 3620, Revised Statutes 1899, was subsequently changed by the Act of 1907 (Laws 1907, p. 301), afterwards Section 6708, Revised Statutes 1909, by making the joint right of occupancy of the widow and children continue until all the children were twenty-one years of age, and expressly authorizing sale of the homestead for the general debts of the decedent, in cases where his heirs “be persons other than his children,” by adding to the Law of 1895 the following: “*Provided*, that if the heirs of the husband be persons other than his children, then such homestead may be sold for the payment of any debt or debts legally established against his estate, subject to the rights of the widow. Such sale in either case may be made at any time during the course of administration of the husband’s estate, and to be conducted in like manner and the same proceedings had as is or may be provided by law for sales of other real estate for the payment of the debts of deceased persons.”

It is firmly established that the rights of the widow and children and the creditors are fixed and determined by the law in force when the husband dies. [Bushnell v. Loomis, 234 Mo. 384-5; Balance v. Gordon, 247 Mo. 131.]

So that George Manear, having died October 15, 1907, the Act of 1907 was then in force and the rights of the parties hereto must be determined by that act or said Section 6708, Revised Statutes 1909. Under the said Section 3620, Revised Statutes 1899, it has been uniformly held that the probate court has no power to sell

the homestead for the debts of the deceased, because the statute prohibited such sale and vested the title in the widow and children and heirs free from the claims of creditors of the deceased, and, in effect, holding that the homestead is no part of the decedent's estate and is not subject to the jurisdiction of the probate court in administering his estate. [Broyles v. Cox, 153 Mo. 242; In re Powell's Estate, 157 Mo. 156; Balance v. Gordon, 247 Mo. 127; Armor v. Lewis, 252 Mo. 574; Ehlers v. Potter, 219 S. W. 916; In re Boward v. Boward, 288 Mo. 148, 231 S. W. 600.]

It is true, that the question did not arise collaterally in all the above cases, but it did arise collaterally in Balance v. Gordon, 247 Mo. 119, and Armor v. Lewis, 252 Mo. 568, and the point was urged by counsel, as shown by their briefs in the Armor Case, that if the probate court had jurisdiction over the subject-matter and the parties, its judgment ordering the sale could not be absolutely void and subject to collateral attack. But the court necessarily ruled that the said court had no such jurisdiction to sell the homestead, which was the subject-matter of its action.

In the Armor Case, supra, l. c. 582, the court, per LAMM, J., said: "It must be taken as assumed that it could not be contended for a moment that the probate court had any jurisdiction to order the sale of the homestead in contravention of the Homestead Statute." And on page 576, the learned Judge observed: "We shall not overrule the Broyles-Cox, the Powell and the Balance-Gordon cases. *Stare decisis*." All of which cases held, that the probate court had no power to sell the homestead for debts of decedent.

This court very recently had occasion to review its prior decisions, and especially the Armor Case, supra, and the cases therein relied upon, and has construed them as holding that a sale of the homestead by the probate court under the Act of 1895, was without jurisdiction and subject to collateral attack as absolutely null

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and void. [In re Ehlers v. Potter, 219 S. W. 916; In re Boward v. Boward, 288 Mo. 148, 231 S. W. 600, decided this term of court, in which it is said, such sale is "*coram non judice*."]]

So, under the law as it stood in Wag. Stat., sec. 5, chap. 58, when the homestead was vested in fee in the widow with a joint right of occupancy in the children until majority, this court held that the orders and judgment of the probate court authorizing the administrator to sell and confirming the sale of the homestead for debts of the husband were absolutely void in collateral proceedings. [Lewis v. Barnes, 272 Mo. 377; Rogers v. Marsh, 73 Mo. 64; Anthony v. Rice, 110 Mo. 223.] In the case last cited, the widow appeared and contested in the probate court the application of the administrator for such order of sale, but took no appeal from the adverse judgment of the probate court, notwithstanding which, this court held the proceedings void for want of jurisdiction in the probate court. The Rogers Case and the Anthony Case are also referred to with approval in Balance v. Gordon, 247 Mo. supra, at page 127.

So that, without reference to the authorities from other jurisdictions cited by learned counsel for respondent, we hold that it is the settled law in this State that under the said Act of 1895, and afterwards up to the taking effect of the Act of 1907, the probate court had no jurisdiction over the subject-matter when it attempted to sell the homestead of the decedent for his debts, and any such sale was an absolute nullity and void upon collateral attack.

II. Did the Act of 1907 (Sec. 6708, R. S. 1909), in case the decedent left children him surviving, give the probate court any more or other jurisdiction than the Act of 1895? Obviously, not. It is only in case the heirs of the husband "*be persons other than his children*," that the probate court has power or jurisdiction to

Act of 1907;
Heirs Other
Than Children.

make such sale under the Act of 1907. In this case, the husband's heirs were his children and his grandchild. So that it cannot be said that his heirs were "persons other than his children." The statute of 1907 means that only in case all the husband's heirs are "persons other than his children" can the homestead be sold for his debts not expressly charged thereon in his lifetime, which is not claimed was the case here. If he left *any* children as his heirs, it cannot be said that his heirs were "persons other than his children." Any other construction would be a "sour" construction of the statute, which this court, per LAMM, J., said, in the *Armor Case*, *supra*, was not admissible.

We rule, therefore, that the administratrix's sale in question here was an absolute nullity for want of jurisdiction in the probate court over the subject-matter of such sale, and as such is subject to collateral attack.

III. Nor is it material that the widow and two daughters and grandchild of George Manear left the homestead after his death and changed their domicile to Springfield, Missouri, where they resided when such sale was made. The rights of his children and heirs as remaindermen in fee became vested in them upon the death of the householder, and there is nothing in the statute requiring them to continue to reside on the property or forfeit their title. The case of *Wilson v. Wilson*, 255 Mo. 528, is beside the point, because under the statute passed on in that case, a statute prior to the Act of 1895, the heirs had no fee in remainder.

IV. Under the statute of 1895, as amended in 1907, the remainder in fee passed to the heirs, all the heirs of the deceased husband. This would vest an undivided one-third in the grandchild in this case. Said one-third was not subject to the sale made by the administratrix, although said minor was not the child of the decedent, because, as we have just ruled, the homestead could not be sold by the

**Right of
Grandchild.**

probate court for the decedent's debts unless all his heirs were "persons other than his children," which was not the case here.

V. The estoppel pleaded in the answer is not urged in this court by learned counsel for respondent, no doubt, because the facts in the record show the children knew nothing of the administratrix's sale and received none of the proceeds, and the widow refused, as administratrix, to file petition for the making of such sale, which was made upon petition filed by the creditors because she did so refuse. Obviously, there was no estoppel against the plaintiffs in this case.

VI. We rule, therefore, that the plaintiffs, as heirs of said George Manear, deceased, own the fee in the land in dispute, subject to the rights that were conveyed to the defendant by the quit-claim deed of the widow. This deed conveyed all her rights, whether of homestead, dower or quarantine, in the property to the defendant. [Phillips v. Presson, 172 Mo. 24.]

VII. Did the minor child, Leon England, have right of joint occupancy with the widow and daughters of the deceased until she was twenty-one years of age?

We think not. While the statute is entitled to a most liberal construction, it cannot be construed beyond the intent of the Legislature. [Regan v. Ensley, 283 Mo. 297, 222

S. W. 773.] We do not think that grandchildren come within the intent of the Legislature as the children who would have a joint right of occupancy of the homestead with the widow until they are twenty-one years of age—even although they had been residing with the decedent as members of his family, their parents being dead, as in this case. It was only the *minor* children of the householder who were to have any such right of occupancy, and this was to cease when they reached the age of twenty-one years. This shows, that even all of the householder's own children were not to be beneficiaries

in such joint tenancy, and it was to be limited to his "minor children," and that such words were used in their ordinary and primary meaning. The words "minor children" have been construed in the following cases in other jurisdictions, and we concur in the construction, not to include "minor grandchildren," in similar provisions in homestead acts, although they were dependent members of the householder's family, at the time of his death: *Peeler v. Peeler*, 68 Miss. 141; *Wilkins v. Briggs*, 48 Tex. Civ. App. 598; *Clements v. Maury*, 110 S. W. 185; *Brown v. Brown*, 104 Ark. 313. Consequently, the minor plaintiff, Leon England, had and has no joint right of occupancy as a minor child of the decedent until she is twenty-one years of age, but her right is limited to her remainder in fee as an heir of the decedent.

**Right of
Occupancy:
Children.** VIII. It appears that both of the plaintiffs, Allie Dennis and Marie Heareld, were more than twenty-one years of age when the administratrix's deed was made, which was the 5th day of May, 1913. Their right of joint occupancy, therefore, as minor children of the deceased, had expired long before this suit was brought, which was July 5, 1919.

**Dower Until
Assignment.** IX. The widow having remarried since her husband's death, as we assume from her testimony that her name was Laura Hendricks at the time of the trial, the defendant has no right to possession of said property, as the grantee of the widow's homestead right, because that expired with her remarriage, under the statute.

But defendant also acquired the widow's right of dower and quarantine by his deed from her, which gave him a right of possession to said property until said dower is assigned. [*Phillips v. Presson*, 172 Mo. supra.] Such dower and the assignment thereof are expressly provided for by the Homestead Act in force on October 15, 1907, when George Manear died. [Sec. 6708 and 6710, R. S. 1909.]

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The result is, the judgment of the circuit court on the second count of the petition, is affirmed, but is reversed as to the first count, the count to quiet title, and remanded with directions to the circuit court to enter judgment on said first count, declaring that plaintiffs are the owners in fee simple of the property described in the petition, subject to the dower and quarantine rights of said former widow of George Manear, deceased, which are owned by the defendant, all in accordance with the views expressed in this opinion. *Ragland, C.*, concurs; *Brown, C.*, not sitting.

PER CURIAM:—The foregoing opinion by *SMALL, C.*, is adopted as the opinion of the court. All of the judges concur.

FLORENCE McKENNA et al., by Next Friend, ANNIE GREEN, Their Guardian, v. JOSEPH A. LYNCH, Appellant.

Division One, July 11, 1921.

1. **INSTRUCTION: Presumption of Fact: Contributory Negligence.** It is improper, ordinarily, to instruct a jury with reference to presumptions of fact as they relate to questions submitted for their determination after hearing the evidence. In a suit for damages for the negligent killing of a pedestrian by an automobile in the night time, an instruction telling the jury that "you are further instructed that the burden of proving contributory negligence on the part of the deceased is upon defendant; the presumption is that the defendant was in the exercise of ordinary care for his own safety at the time of his death, and this presumption continues until overthrown by a preponderance or greater weight of the evidence," is erroneous, if there was any substantial evidence whatever of contributory negligence on the part of deceased, sufficient to take the question to the jury.
2. **AUTOMOBILE AND PEDESTRIAN: Relative Rights to Street: Duties to Each Other.** A pedestrian, equally with the operator

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of an automobile, has the right to be upon and use the traveled part of a public street instead of the sidewalk, and it is not as a matter of law the duty of a pedestrian, while walking along the traveled part of a highway, to turn about constantly and repeatedly to observe the possible approach of vehicles from the rear. On the contrary, such a pedestrian may assume that the operator of the automobile will exercise ordinary care in keeping a lookout; that under ordinary conditions he will be discovered by such operator; and that the operator, as he approaches, will slow down and give an audible signal with his horn; but he is also required to be on the lookout for automobiles, and to exercise ordinary care for his own protection, according to the circumstances of the situation in which he finds himself.

3. **INSTRUCTION: Contributory Negligence: None as Matter of Law.** It cannot be said as a matter of law that at the time deceased was struck by an automobile on a traveled portion of a street not customarily used by pedestrians he was in the exercise of ordinary care for his own safety, where the time was a dark night, and there was evidence that he walked straight ahead without turning his face to the right or left, and that the advancing rays of the headlight shot past him while it was a hundred yards away.

Appeal from St. Louis City Circuit Court.—*Hon. George H. Shields*, Judge.

REVERSED AND REMANDED.

Bryan, Williams & Cave for appellant.

(1) The court erred in giving plaintiff's instruction numbered 2, for the reason that it tells the jury that there is a presumption that the deceased was exercising ordinary care, while at the same time submitting the question of his care as an issue. The evidence with reference to deceased's actions being before the jury, there was no presumption, and it was error to so instruct. *Moberly v. Ry. Co.*, 98 Mo. 183; *Schepers v. Union Depot Ry. Co.*, 126 Mo. 665; *Meyers v. City of Kansas*, 108 Mo. 480; *Rodan v. St. Louis Transit Co.*, 207 Mo. 392; *Hutchinson v. Safety Gate Co.*, 207 Mo. 392; *Stails v. Baking Co.*, 223 S. W. 89; *Brannock v.*

Railroad, 147 Mo. App. 320; Lee v. Publishers, 55 Mo. App. 390; Mockowik v. Railroad, 196 Mo. 550; Reynolds v. Casualty Co., 274 Mo. 113; Higgins v. Railroad, 197 Mo. 300; Taylor v. Tel. Co., 181 Mo. App. 288.

(2) The court erred in giving plaintiff's instruction numbered 2 for the following reasons: (a) When read in the light of the particular facts here, it tells the jury, as a matter of law, that it was not negligence for the deceased to walk in the traveled part of the highway in the middle of the block on a dark night, at a place other than the usual pedestrian's crossing, under the conditions existing in this case, while as a matter of fact this was certainly a question as to which reasonable minds might differ, and therefore for the jury. Jackson v. S. W. Bell Tel. Co., 219 S. W. 659. (b) It singles out a particular fact for the consideration of the jury, and tells them that it is not negligence, and thereby gives it special importance. And "no instances are to be found where such a practice has not been condemned by the appellate courts of this State." Landrum v. Railroad, 132 Mo. App. 717.

John C. Robertson and Phil H. Sheridan for respondent.

(1) Plaintiff's instruction numbered 2, telling the jury that the deceased McKenna was presumed to be in the exercise of ordinary care for his own safety, was proper in this case, as there was no evidence at all of contributory negligence on the part of said McKenna. Buesching v. Gas Light Co., 73 Mo. 219; Riska v. Union Depot Railroad Co., 180 Mo. 168; Eckhard v. Transit Co., 190 Mo. 613; Wiegman v. Railroad, 223 Mo. 718; McGahan v. Transit Co., 201 Mo. 507; Menteer v. Fruit Co., 240 Mo. 186; Goff v. Transit Co., 199 Mo. 706; Weller v. Railroad, 164 Mo. App. 205; Stotler v. Railroad, 200 Mo. 146; Mockowik v. Railroad, 196 Mo. 550; Richter v. Railroad, 145 Mo. App. 1. (3) Plaintiff's

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instructions numbered 3 and 4 correctly state the law. A pedestrian and the user of an automobile have equal rights upon public highways and each is to use them, bearing in mind the rights of the other. The beggar on his crutches has the same right to the use of the streets as the driver of an automobile; each is bound to use ordinary care for his own safety and the prevention of injury to others. Thompson on Negligence, sec. 1300; Frankel v. Hudson, 271 Mo. 495; Ostermeier v. Imp. Co., 255 Mo. 135; Kinlen v. Railroad, 216 Mo. 145; Carradine v. Ford, 195 Mo. App. 684; Hodges v. Chambers, 171 Mo. App. 563; Meenach v. Crawford, 187 S. W. 879; Blackwell v. Renick, 21 Cal. App. 131; Gray v. Batchelor, 208 Mass. 441; Babbitt on Motor Vehicles, sec. 1257; Brewing v. Railroad, 180 Mo. App. 434; R. S. 1919, sec. 7593; Clark v. Missouri Auto Co., 177 Mo. App. 623; Bonger v. Ziegenheim, 165 Mo. App. 328; Berry's Auto Law, p. 114.

RAGLAND, C.—This is a suit by the guardian of the minor children of Michael McKenna, deceased, to recover of the defendant damages to said minor children for the death of the said Michael in February, 1918, resulting from being struck by an automobile driven by defendant at the time, westwardly along Laclede Avenue in the City of St. Louis, between Vandeventer and Sarah. The deceased at the time of his death was forty-eight years old, and was a moulder earning approximately \$1,000 per year. He left surviving him four minor children, a girl fourteen, and three boys, aged thirteen, twelve, and nine, respectively.

The plaintiff's petition contains charges of negligence sufficiently broad to cover the instructions given to the jury.

The answer raised the issue of contributory negligence.

There was evidence tending to show that at the time of the accident it was dark—there being some dispute

as to the nearness of a street lamp to the exact scene of the accident; that the point of the accident was in the middle of the block, and at a point other than a regular pedestrian's crossing; that defendant was driving west at a speed in excess of the rate provided by ordinance, which ordinance was pleaded and proven by the plaintiff; that the defendant was accompanied by one J. E. Bowen, and this witness and the defendant both testified that as they drove west from Vandeventer Avenue and approached the scene of the accident, the headlights were burning and that they were both looking straight ahead all of the time.

The defendant testified that on account of the condition of the weather he could only see directly ahead of him and a little to each side of the machine; that he could see the street ahead of him within the radius of his headlights, and that within that radius he could see approximately 100 feet; that he came west, driving at about twelve miles an hour; that he was looking ahead all the time; that when he first saw McKenna the latter was about ten or twelve feet directly ahead of the machine in front of the left wheel; that he saw him suddenly and did not know where he came from or what he was doing, though he appeared to be walking in the same direction in which he, defendant, was going; that he had been looking straight ahead before he saw McKenna and when he saw him he threw off his power and applied his brakes and threw out his clutch and tried to turn his car; that they came to a sudden stop, his car having skidded to an angle of about forty-five degrees with the curb, and headed northwest; that the front end of the machine skidded around; that the machine did not pass over him; that after the machine was stopped McKenna was lying about fifteen feet from the left rear wheel; that under the conditions as they existed at the time of the accident he could stop his Ford in about fifteen feet; and that on this particular occasion he traveled about fifteen feet after he tried to stop his car, although on

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cross-examination, he admitted that his car moved a distance of approximately forty-five after he first saw McKenna.

The testimony of the defendant was corroborated by that of Bowen in all essential particulars. No other witness saw the deceased prior to the accident.

Defendant sounded no horn or other warning and there was evidence tending to show that the defendant's automobile could, under the facts and circumstances shown in the evidence, have been stopped after the defendant saw the deceased, if the defendant had been driving at the rate of speed provided in the ordinance or at a lesser rate of speed.

On the other hand, there was evidence tending to show that the automobile of the defendant could not, under the circumstances shown in the evidence, have been stopped after the defendant saw the deceased, even though the defendant had, at the time, been going at the ordinance rate of speed or even at a lesser rate than that fixed by the ordinance.

The verdict and judgment were for plaintiffs. Defendant appeals.

The assignments of error are all predicated on the action of the court in giving and refusing instructions.

Among others, the following instruction was given at plaintiff's instance:

"You are further instructed that the burden of proving contributory negligence on the part of the deceased Michael McKenna is upon the defendant, the presumption is that the deceased was in the exercise of ordinary care for his own safety at the time of his death, and this presumption continues until overthrown by a preponderance or greater weight of the evidence."

If there was any substantial evidence whatever of contributory negligence on the part of deceased, that is, evidence to take the case to the jury on that question, it was error to give this instruction. The impropriety, ordinarily, of instructing juries with respect to presump-

tions of fact as they relate to questions submitted for their determination after hearing evidence, has been so frequently elaborated upon in numerous decisions of this court that no additional light would be thrown upon the subject by a further discussion. [State ex rel. v. Ellison, 268 Mo. 239; Rodan v. Transit Co., 207 Mo. 392; Morton v. Heidorn, 135 Mo. 608; Ham v. Barret, 28 Mo. 388; Myers v. Kansas City, 108 Mo. 480.] As was said by BLAIR, J., in State ex rel. v. Ellison, supra (l. c. 257): "To say in an instruction to a jury, in the case of a rebuttable presumption, and when evidence has been introduced upon the question, that 'the law presumes' so and so and that such presumption 'must be overcome' or 'overthrown' by evidence, is sometimes useless, sometimes prejudicial and always illogical." To so instruct the jury under the circumstances of the instant case, if error at all, was prejudicial. [Morton v. Heidorn, supra.]

The question then is: was there evidence on which defendant could go to the jury on his plea of contributory negligence? It must be conceded that a pedestrian, equally with the operator of an automobile, has the right to be upon and use the traveled part of the highway instead of the sidewalk; that it is not as a matter of law the duty of a pedestrian while walking along the traveled part of a highway to turn about constantly and repeatedly to observe the approach of possible vehicles from the rear (Blackwell v. Renwick, 21 Cal. App. 131); that on the contrary he may assume that the operator of an automobile will exercise ordinary care in keeping a lookout; that under ordinary conditions he will be discovered by such operator; and that the latter will as he approaches slow down and give an audible signal with his horn. [Sec. 7593, R. S. 1919.] In view of these correlative rights and duties of a pedestrian and the driver of an automobile, must it be said, as a conclusion of law on the facts disclosed by the record in this case, that deceased at the time he was struck was in the exercise of ordinary care for his own safety?

Deceased was walking along on the traveled portion of a street at a place not customarily used by pedestrians; it was dark; during the brief interval in which he was observed just prior to the collision, he walked straight ahead without turning his face to the right or to the left; had he earlier taken the precaution to look to the rear he could have seen the approaching car long before it reached him; the advancing rays of the headlights must have shot past him while it was yet a hundred feet away; and had he listened at all for the approach of cars he must have heard it in time to have stepped aside and avoided being struck. It is a reasonable inference that he was conscious of the approach of an automobile, or else he was so indifferent to such happening that his senses took no note of the fact. And it may be further inferred that he gave no thought to the approach of such a vehicle, or, if he was conscious of its coming, took no steps to get out of its way, because he assumed that the driver would exercise the proper degree of care and by so doing would see and avoid striking him. Had it been broad day-light and the vision of the operator of the car clear and unobstructed, deceased would no doubt have been fully justified in acting upon such assumption. But under the conditions as they existed, it was entirely possible that the driver, even if exercising ordinary care, would not have seen him until it was too late to have avoided striking him. While a pedestrian has the right to assume that drivers of automobiles will be on the lookout for him, he is also required to be on the lookout for them, and in all cases is bound to exercise ordinary care for his own protection, according to the circumstances of the situation in which he finds himself. [O'Dowd v. Newnham, 13 Ga. App. 220.] Whether deceased exercised such care, or whether he was guilty of negligence which contributed to bring about his own injury and death, was, on the facts shown by the evidence, clearly for the jury to determine. It follows that the giving of the instruction in question was error.

Other instructions given for plaintiffs are criticised, but their defects, which are essentially technical, may be avoided on another trial.

For the error noted the judgment will be reversed and the cause remanded. *Brown and Small, CC., concur.*

PER CURIAM:—The foregoing opinion of RAGLAND, C., is adopted as the opinion of the court. All of the judges concur.

GUST NOOK, Appellant, v. J. B. ZUCK et al.

Division One, July 11, 1921.

1. **WILL: Attestation: Recitals: Witness to Mark.** The statute requiring that "every will shall be in writing, signed by the testator, or by some person, by his direction, in his presence; and shall be attested by two or more competent witnesses subscribing their names to the will in the presence of the testator" does not require that a statement of all these things shall appear on the face of the will, or that the word "attest" or that anything whatever shall be written thereon other than the name of the testator and the names of the witnesses. If the maker signed the will by making his mark, and three other competent persons signed it as "witness to mark," and testify that the mark was made before they signed it, and that he declared it to be his last will and they signed it at his request as witnesses and in his presence, it was sufficiently attested.
2. ———: **German Testator: Read to Him in English.** The testator could, with difficulty, speak a few words in English and make his wants known in making purchases, but could not write or read the English language, and said he could not talk it well enough to dictate his will in English; the scrivener could not understand German, but the testator told two witnesses who could understand both German and English just what different amounts of money he wished to give to each of his children and what land he wished to devise to a certain daughter, and those witnesses translated and repeated his requests to the scrivener in English, who wrote them down in English, and after the will was completed it was

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read to him in English, and he thereupon signed it and asked the witnesses to attest it, but one of them before he signed it talked with him and he told them the paper was his last will and testament and wanted them to sign it; and the evidence is clear that he comprehended the extent of his property and the disposition he wished to make of it, and the oral testimony is all to the effect that the instrument disposed of it as he desired. *Held*, that the instrument was his will and testament.

3. ———: **Undue Influence: Peremptory Instruction.** Where there is no evidence of coercion having been exercised at or prior to the time the will was executed, and the only approach to proof of undue influence is the testimony of parties in interest that the testator subsequently to the execution of the will cried and said they made him change his will, it is the duty of the court to direct a verdict for the proponents.
4. ———: **Testamentary Incapacity: Old Age: Paralysis.** Where the only evidence of testator's testamentary incapacity is that he was between eighty-five and eighty-six years of age, and had for some time been paralyzed and unable to walk or use his hands, but his digestion and assimilation were good, and the paralysis had no tendency to affect his mind, there is no evidence of mental incapacity, and a peremptory instruction directing a verdict for proponents on that issue is proper.

Appeal from Atchison Circuit Court.—*Hon. John W. Dawson*, Judge.

AFFIRMED.

R. F. Hickman and Hunt, Bailey & Hunt for appellant.

(1) The will being in the handwriting of another, proof of the adoption by the testator must be clear. 40 Cyc. 1084; *Plater v. Groome*, 3 Md. 134. (2) The testator must know and understand the contents and meaning of the will. If it appears affirmatively that he did not read it, and that it was not read to him, it must be shown that the contents were in some way known to him. 40 Cyc. 1100-2, 1101-d. (3) A will executed in a language unknown to the testator is valid where it appears he knew the contents, but otherwise is void. 40

Cyc. 1101-e; Miltenberger v. Miltenberger, 78 Mo. 27; Bingaman v. Hannah, 270 Mo. 611, 629; Adams v. DeCook, 23 How. (U. S.) 353; Carlson v. Largram, 250 Mo. 527 to 538. (4) It reversible error to give a peremptory instruction in the nature of a demurrer to the evidence, where there is any substantial evidence supporting plaintiff's case. 38 Cyc. 1548; Crum v. Crum, 231 Mo. 626; Bender v. Railroad, 137 Mo. 240, 244; Young v. Webb City, 150 Mo. 333, 341; Enloe v. Car & Foundry Co., 240 Mo. 443, 448; Carlson v. Lafgram, 250 Mo. 527, 537; Re McCabe, 134 N. Y. Supp. 682.

Tinley, Mitchell, Pryor, Ross & Mitchell and James F. Gore for respondents.

(1) Under the evidence in this case the court was justified in giving a peremptory instruction. Hahn v. Hammerstein, 270 Mo. 248, 198 S. W. 833; Southworth v. Southworth, 173 Mo. 59; Welsh v. Kirby, 255 Fed. 451, 9 A. L. R. 1409; Winn v. Grier, 217 Mo. 420; Sayre v. Princeton University, 192 Mo. 95; Crowson v. Crowson, 172 Mo. 691. (2) A will drawn in a language which is not familiar to the testator is good, provided it appears that the testator knew he was making a will, and that the disposition he desired to make of his property was correctly stated in the instrument purporting to be his will. In re Arneson's Will, 107 N. W. (Wis.) 21; In re Gillmor's Will, 117 Wis. 302, 94 N. W. 32; Rothrock v. Rothrock, 30 Pac. (Ore.) 453; Lyons v. Van Ripper, 26 N. J. Eq. 339; Brown v. Brown, 3 Conn. 299; 1 Alexander on Wills, sec. 38, p. 41; In re Will of Walter, 25 N. W. (Wis.) 538; Hoshauer v. Hoshauer, 26 Pa. St. 404; Wombacher v. Barthelme, 62 N. E. (Ill.) 800; Gerbrich v. Freitag, 73 N. E. 338; In re Dobal's Estate, 176 Iowa, 479, 157 N. W. 169. (3) There is a presumption that he who signs a will knows its contents. Hoshauer v. Hoshauer, 26 Pa. St. 404; Ross v. Ross, 140 Iowa, 51; Keithley v. Stafford, 136 Ill. 507; In re Dobal's Will,

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176 Iowa, 479, 157 N. W. 169. (4) The will was properly attested. Sec. 537, R. S. 1909; *Withinton v. Withinton*, 7 Mo. 589; *Murphy v. Murphy*, 24 Mo. 526; *Mays v. Mays*, 114 Mo. 536; *Berberet v. Berberet*, 131 Mo. 399; *Crowson v. Crowson*, 172 Mo. 700; 40 Cyc. 1125; *Borland on Wills*, p. 36, sec. 41.

ELDER, J.—This is a suit to contest the will of Chris Nook, deceased, brought by appellant, a son of the testator. Respondent J. B. Zuck is the administrator, with the will annexed, of the estate of said Chris Nook; respondent Lena Speigel, wife of Andrew Speigel, is the daughter of the deceased; respondents Georgie Mattis et al. are minor grandchildren of the deceased.

The will was dated February 12, 1917, and was admitted to probate by the Probate Court of Atchison County on February 11, 1919. The testator died August 31, 1918.

The charging part of the petition alleges that for several years before his death the testator had been "an invalid, infirm, feeble, childish and of unsound mind;" that he was a German and could not "understand, speak or write the English language; that one P. L. Van Meter, who drew said will for said Chris Nook, deceased, could not understand, speak or write the German language; that one Charles Winkler and George Winkler dictated said will to P. L. Van Meter, and he wrote the said will as they dictated it, and said Van Meter wrote it down as they dictated it, not knowing whether or not they were giving a true and correct version of said will. It was read over to Chris Nook in English, and he could not understand the English language; and plaintiff alleges that said pretended will is not nor does it bear or contain the true version of said will of said Chris Nook, deceased, and is not his will;

"That at the time the said will was made, the said Chris Nook was not capable of making a will at all; and

whatever was done was and is a nullity and absolutely void, and that the said Lena Speigel and her husband, Andrew Speigel, secured said Chris Nook to make said will by fraud, and undue influence, which they practiced upon the said testator, and that the said Chris Nook was not of sound and disposing mind and memory."

The answer of respondents Zuck admits that Chris Nook died leaving as his last will the instrument mentioned in the petition, admits the probate of the said will and the appointment of respondent as administrator, but denies all other allegations of the petition. The answer of respondents Speigel admits the relationship and heirship of the parties; admits the appointment of respondent Zuck as administrator; admits the probate of the will, and that deceased died at the home of respondents Speigel, where he had resided before his death; alleges that the instrument described in the petition is the "valid last will and testament of the said Chris Nook," but denies all other allegations of the petition. The answer of the respondent minors, by their guardian *ad litem*, was a general denial.

The issues were duly submitted to a jury, and, at the close of the evidence adduced by both the proponents and contestant, the trial court gave a peremptory instruction in the nature of a demurrer to the evidence, as follows: "The court instructs the jury that under the law and the evidence, your verdict must be that the instrument offered in evidence, marked defendants' 'Exhibit A,' is the last will and testament of Chris Nook, deceased." Pursuant to such instruction the jury returned a verdict that the paper in evidence was the will of Chris Nook. From a judgment rendered on that verdict, contestant has appealed.

With certain additions thereto (to be considered in the course of the opinion), respondents have agreed to appellant's statement of the facts. We therefore adopt the same in part, as follows:

“At the time of the making of the will in question, the deceased, Chris Nook, was between the age of 85 and 86 years. He was very feeble and practically helpless; unable to walk or use his hands. This condition had existed for more than five years prior to the making of said will. His knowledge of the English language was exceedingly limited. He could speak a few words, such as ‘yes’ and ‘no,’ and could make a few of his wants known, with difficulty, in making purchases. He could not write or read the English language at all, and could not carry on a general conversation in that tongue. Owing to his inability to understand the English language he never employed hands to work for him who spoke English.

“On the 12th day of February, 1917, Charlie Winkler, George Winkler, J. W. Brown and P. L. Van Meter met at the home of the said Chris Nook, deceased, relative to the will in question. P. L. Van Meter acted as scrivener and the two Winkler boys acted as interpreters.

“George Winkler testified that he could not write the German language at all, but that he could translate German language into the English language and write in English; and that he could translate English into German.

“Charlie Winkler testified that he could talk High German, but he could not speak Low German at all, and that he understood it just a little; that he could not write German; that he could not readily translate from the German language into the English language. P. L. Van Meter could not write, read, speak or understand the German language. J. W. Brown could not speak or understand the German language.

“On the date aforesaid, February 12, 1917, when said parties went to the home of Chris Nook, deceased, relative to the will in question, the two Winkler boys spoke to the deceased in German concerning his will, and then translated said conversation to Mr. Van Meter in English, and Van Meter reduced said conversation to writing in English. After the completion of the purported

will said Van Meter read the same over to the deceased in the English language. Said will was never read to the deceased in the German language. After reading said will to the deceased, Van Meter asked him if that was the way he wanted everything, and deceased said, 'Yes.' Neither Van Meter nor Brown knew whether the Winkler brothers correctly translated the language of the deceased from the German language into English.

"Deceased was so badly paralyzed that he had to sign said purported will by making his mark thereto, Van Meter assisting him. The will was signed as follows:

" 'Witness to mark

his

CHARLES WINKLER

CHRIS X NOOK

GEORGE WINKLER

mark

J. W. BROWN

" 'Subscribed and sworn to by Chris Nook this 12th day of February, 1917, in the presence of each of the above witnesses.

" 'P. L. VAN METER.

" (Seal)

Notary Public.'

"The above acknowledgment, which is signed by the notary, was written on the purported will after the other parties signed the same as witnesses to the mark of the deceased.

"Deceased at the time of making the said will, and at the time of his death in August, 1918, lived in Atchison County, Missouri, near the Iowa line, a small portion of his land being in Fremont County, Iowa, and the remainder being in Atchison County, Missouri. The Winkler brothers above mentioned lived in Fremont County, Iowa, a short distance from the home of deceased, and were farmers by occupation. P. L. Van Meter lived in Hamburg, Fremont County, Iowa, and was a banker by occupation. J. W. Brown lived in Fremont County, Iowa, and was engaged in farming and lived a short distance from the home of deceased.

"Andrew Speigel, husband of Lena Speigel, notified George Winkler, Charles Winkler, J. W. Brown and P.

L. Van Meter that their presence was desired at the making of the will in question.

"The evidence disclosed that after the marriage of the children of the deceased, said children, with the exception of Lena, left the home of the deceased and set up homes for themselves. Lena Speigel and her husband, Andrew Speigel, lived at the home of the deceased from the time they were married up to the time of the death of deceased. They promised to keep deceased and his wife as long as they lived, and in return for such care deceased agreed to let them have the land rent free.

"Prior to the making of the will, February 12, 1917, deceased had a conversation with appellant with reference to a will he had made. On that occasion appellant came in the house and noted that deceased was crying very hard. Upon appellant asking him what was the matter he said, 'They made me change the will;' that Andrew Speigel and George Winkler had come down to make me change it. About two weeks before the death of the deceased, and after making the will in question, deceased had a conversation with Miss Minnie Nook, daughter of Gust Nook, appellant. Speaking with reference to the will in question deceased said to Minnie Nook, 'I was forced to make a will, they made me do it,' and cried like a child.

"During the last five years of his life deceased was practically under the sole care and control of his daughter, Lena Speigel, and her husband, Andrew Speigel; and was also under the care and control of his second wife up to the time of her death. During all these years the old man was a helpless invalid suffering from paralysis, dropsy and rheumatism; and he could only make his wants known in the German language. He frequently had crying spells, and spent the latter years of his life sitting in a chair, which caused severe dropsical swelling of his lower limbs."

Other facts necessary to a determination of the questions involved, will be adverted to in the course of the opinion.

The writing in contest, omitting signatures of the testator and witnesses and certificate of the notary public, which are set out in the statement of facts, *supra*, is as follows:

"I, Chris Nook, being of sound mind do make this my last will and testament, hereby revoking all former wills having been made by me.

"I hereby give and bequeath to Mrs. Lena Spiegel all of my farm land with improvements on and known as my home farm consisting of 64 acres, 16 acres being in Iowa, Fremont Co., and the balance in Missouri, Atchison County.

"I further give to Mrs. Martha Mattis' heirs, \$400 same to be paid by Lena Spiegel on execution of this will.

"I also give to Herman Nook's heirs at law \$400 same to be paid by Lena Spiegel on execution of this will.

"I further give to the heirs of Robert Nook \$800 same to be paid on execution of this will, by Lena Spiegel same as above.

"I further give to Gust Nook \$400 same to be paid by Lena Spiegel on execution of this will.

"I also have \$1000 cash out of which I want all funeral expenses paid first and the balance with such accrued interest as may be, divided equally between the five heirs named above.

"I also state further that in case any of my heirs contest this will that they are to lose their share of my estate as above divided."

I. Appellant contends that the trial court erred in admitting in evidence the will of the deceased for the reason that it was not properly attested.

The statute governing the attestation of wills, Section 537, Revised Statutes 1909 (Sec. 507, R. S. 1919), provides that "every will shall be in writing, signed by the testator, or by some person, by his direction, in his presence; and shall be attested by two or more com-

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petent witnesses subscribing their names to the will in the presence of the testator." As said in *Berberet v. Berberet*, 131 Mo. l. c. 408, "The statute says the will shall be attested by two or more competent witnesses subscribing their names thereto. It does not say that the word attest shall be written on, or at the conclusion of, the will, or that there shall be written thereon anything whatever other than the names of the attesting witnesses." And as said by Woodson, J., in the recent case of *Welch v. Wagner*, 232 S. W. 146, in commenting upon this section, "It will be observed that the statute only requires that the will shall be signed by the testator, or by some person at his direction, in his presence, and that it shall be signed by the witnesses in the presence of the testator. The statute nowhere requires the will to state upon its face that any or all of those things were done."

With respect to the circumstances attending his signing of the will as a witness, George Winkler testified: "Mr. Nook asked me to sign it, as a witness to his will. When I signed it I noticed that Mr. Chris Nook made his mark there at the time. That mark was made prior to the time that I signed it as a witness. J. W. Brown, my brother Charles, Mr. Nook and myself were all present. . . . I saw Charles Winkler and J. W. Brown sign their names there on defendants' 'Exhibit A,' and I saw Chris Nook make his mark there."

Charles Winkler testified: "I signed my name there to defendants' 'Exhibit A.' That is my signature. George Winkler, J. W. Brown and P. L. Van Meter and Chris Nook were present.

"Q. How did you come to write your name there and at whose request, if anybody's? A. Mr. Nook's.

"Q. And what for, what purpose? A. For a witness.

"Q. To what? A. To the will. . . . I saw the other signatures made there by my brother and J. W.

Brown. Mr. Nook made his mark prior to the time I signed my name to the will. . . . Mr. Chris Nook asked me to sign as a witness."

J. W. Brown testified: "That is my signature to defendants' 'Exhibit A.' Before I signed I saw Mr. Nook make his mark; that mark was there when I signed my name. After Mr. Van Meter read that over in English I asked Mr. Nook if that was his will and if that was the way he wanted it, and he said it was, before I signed it. . . . I signed at Mr. Nook's request."

From the foregoing it is manifest that the statute was fully complied with. Accordingly, and upon authority of the adjudicated cases, we must hold that the will was sufficiently attested. [Berberet v. Berberet, *supra*; Mays v. Mays, 114 Mo. 536; Grimm v. Tittman, 113 Mo. 56; Schierbaum v. Schemme, 157 Mo. 1; Cravens v. Faulconer, 28 Mo. 19.]

II. Appellant next urges that the court erred in holding that the instrument offered in evidence was the last will of Chris Nook, deceased. In support of this insistence learned counsel for appellant argue that it appears affirmatively that Mr. Nook did not read the purported will; that it was not read to him in a language that he could understand; and that the proponents of the will did not show by any testimony that he knew the contents of the same after it was written.

As authority for the contention urged, counsel rely largely upon Miltenberger v. Miltenberger, 78 Mo. 27. An examination of that case, however, renders it readily distinguishable from the case at bar. While the will in question was there written in a language which the alleged testatrix could not read, write or speak, it was attested by witnesses not at her request, but at the request of one of the legatees, and neither of the witnesses could testify to any declaration of the deceased, or any act on her part, except that of signing the paper, or any

Directions Given
in German: Will
Written in English.

declaration in her presence and hearing indicating that she knew the contents of the paper, or that she signed it as her last will. The evidence here is clear that the deceased knew that he was making a will, that he knew the disposition he desired to make of his property, and that he requested the attesting witnesses to sign the instrument as his will. Charles Winkler, one of the attesting witnesses, testified: "Before I signed we talked with him and he told us that this was his last will and testament, and that he wanted me to sign it. . . . I think he understood about his children and grandchildren, and his son and daughter that were living. He knew them. I think that he comprehended the extent of his property and the effect that his will would have upon it." J. W. Brown, another attesting witness, testified: "I asked him if that was his will, what he wanted done with his property, and he said it was. That was after Mr. Van Meter read this will. So I signed there." The circumstances surrounding the execution of the paper in question being so entirely dissimilar, the Miltenberger case, *supra*, cannot therefore be said to be controlling in the instant case.

With respect to the deceased's understanding of the contents of the instrument after it was written, a review of the evidence shows that he could speak, read and write the German language. George Winkler and Charles Winkler, who spoke both German and English, testified that at the time the will was written the deceased directed them in German that \$400 be given to the heirs of Martha Mattis, \$400 to Gust Nook, \$400 to the heirs of Herman Nook, \$800 to the heirs of Robert Nook, all to be paid by Lena Spiegel; that Lena Spiegel was to have the land, and that "after the funeral expenses and everything was paid" the \$1000 in cash which Mr. Nook had was "to be divided equally between all of the heirs, those that had been mentioned." These directions, which the writing under review shows were embodied therein, were communicated in English by the Winklers to Mr. Van

Meter, the scrivener, who could not write or understand the German language. Mr. Van Meter testified: "I wrote down all of what I understood of what the Winkler boys told me, and when I didn't I asked them over, and they would ask him questions as they went along, in regard to the different portions. That continued through the entire writing of this instrument. . . . I read the will over to him and asked him if that was the way he wanted everything. I read the will in English. When I asked him the question he said, 'Yes.' I asked him if that was like he intended in every way. He said, 'Yes.' He nodded his head, but you couldn't go by that altogether because he was palsied, but he would understand."

As to deceased's understanding of the English language George Winkler testified: "He could understand and talk some English, quite a good deal. He said he couldn't talk well enough to dictate his will in English." Dr. E. E. Richards, who had visited the deceased professionally, and who could not speak German, testified:

"Q. Were you able to communicate with Mr. Nook at that time? A. Pretty good: not all that I wanted to ask him, but most of it. "Q. Did you have any particular trouble to get him to understand what you were asking him? A. No, I didn't; but I had a good deal of trouble understanding him."

J. W. Brown testified: "I don't know how well he could talk English, but he could talk well enough so he could make me understand anything he had to sell, or if he wanted to buy anything he could make me understand. If I had anything to buy or anything to sell he could understand me. . . . When they were making this will, he would dictate to them in German, and then they would translate it into English; I suppose they were translating it correctly. They seemed to be pretty honest people. I knowed them a long time, and I never knowed them to tell anything but the truth." Charles W. Davey, an implement dealer, testified: "I transacted business with Mr. Nook in English. I had

no general conversation with him, just buying and selling. He didn't always see what he wanted—he would ask for it; as I recollect it he would call it by the right name in English. He could count money in English.”

In *Wombacher v. Barthelme*, 194 Ill. 425, 62 N. E. 800, where the testator, a German, had declared his purpose of making a will substantially as it was made, and his statements showed that it was framed in accordance with his intention and purposes, conflicting evidence as to his ability to read the English language, in which the will was written, was held insufficient to show that he did not know the contents of the will, so as to render it invalid.

In *Gerbrich v. Freitag*, 213 Ill. 552, 73 N. E. 338, where the makers of a joint will were Germans, but understood English, and where the scrivener read it to them in English, explaining it in German, it was held that the testators understood the contents of the will and executed it in accordance with the law.

In the proceeding, *In re Arneson's Will*, 128 Wis. 112, 107 N. W. 21, where a will written in the English language, which the testator did not understand, was translated to him before execution in Norwegian, which language he did understand, it was held valid, the court saying: “Of course in such a case it should appear clearly that the testator was otherwise accurately informed of the contents and meaning of the instrument in a language which he did understand, but that being established, as we consider to be the case here, there is more doubt of his purpose and intention in executing it than if his knowledge of the contents were derived from reading or hearing read a document written in a language which he did understand. How, otherwise, could parties who understood no common language become mutually bound to any written contract?” In *Rothrock v. Rothrock*, 30 Pac. (Ore.) 453, the will of a speechless paralytic, seventy-four years of age, whose mind was unimpaired, was held valid where his wishes

as to the disposition of his property were communicated by negative and affirmative replies to questions asked him, and, after it was written, it was read to him item by item, and his assent given by nods of his head.

In the proceeding. In re Estate of Dobals, 176 Iowa, 479, where the testatrix, who was a German, told the scrivener in English the disposition she desired to make of her property, and while the scrivener was writing she talked the provisions over in German with a banker who was her business adviser, and the banker told the scrivener in English what the testatrix had told him in German, which the scrivener testified was the same as what he had understood previously from her in English, it was held that the evidence was insufficient to justify submission to the jury of the question whether deceased would sufficiently understand the English language to understand the will and what she was doing at the time of its execution.

In Hoshauer v. Hoshauer, 26 Pa. St. 404, the rule is enunciated that when the execution of a will had been proved by the subscribing witnesses, although the witnesses did not hear it read to the testator, it is to be presumed that he was acquainted with its contents, notwithstanding the fact that he could neither read nor understand the language in which it was written.

An analysis of the evidence in the case under review shows that the testator Nook manifestly comprehended the nature of the transaction he was engaged in, knew the nature and extent of his property and to whom he desired to give it, and knew that he was disposing of it to the persons mentioned in the writing. Under the rulings of this court he therefore had sufficient capacity to make a will. [Hahn v. Hammerstein, 272 Mo. 248; Sayre v. Trustees of Princeton University, 192 Mo. 95; Southworth v. Southworth, 173 Mo. 59.] And when the evidence is measured by the principles laid down in the relevant adjudications of other jurisdictions as above set forth, we are led to conclude that he fully

understood and approved of the contents of the instrument in contest. We therefore rule that the trial court properly held the document offered to be the last will of Chris Nook.

III. Appellant assigns as error the action of the trial court in giving the peremptory instruction in the nature of a demurrer to the evidence. In support of this assignment appellant urges that "the evidence shows that there was some undue influence brought to bear upon him by his daughter, Lena Speigel, and her husband Andrew Speigel, to make the will in their favor; that the old gentleman was influenced, and that he executed the will under fear and on threats of his said daughter and her husband."

**Peremptory
Instruction.**

A scrutiny of the record discloses that Andrew Speigel did summon the witnesses to the will to the Nook home for the purpose of witnessing the instrument. The testimony shows, however, that the the time of the drawing and execution thereof neither Mr. Speigel nor his wife were present in the room. George Winkler testified: "The morning I went over to make the will, Mr. Speigel 'phoned me to come over; nobody came after me . . . When this will was formulated there, I do not know where Mr. Speigel was; he was not in the house. His wife, Mrs. Speigel, might have been in the house, but she wasn't in that room. . . . In my judgment his mental condition at that time was good, strong and vigorous. He knew all that we were doing there. The old gentleman told me what he wanted to do. And he named over the terms. . . . He said something to me that morning about an old will. He said he wanted to make a different will, and he told me his reasons why. He said that he was a great care, and that Lena, his daughter, was the only one that cared for him and that he wanted to protect her." Charles Winkler testified: "I was called there by Andrew Speigel. Lena Speigel

was in there just a few minutes, when I came there. Upon my arrival she departed in the other room. She wasn't in the room with us gentlemen after that. Andrew Speigel was not present at any time. After Mr. Van Meter came Mr. Nook said he wanted to make a will. . . . Pretty soon he told us the terms of the will. Lena was not present at the time of that conversation. She went to a different room. My brother closed the door. . . . I think he comprehended the extent of his property and all the persons of his bounty. He named nearly all his grandchildren. He suggested them all himself."

J. W. Brown testified: "Mrs. Spiegel was there at the place, and at the house, but not in the room. She was not in the room where Mr. Nook was and the terms of this will was not talked over there between us all, before he commenced dictating to the boys to be translated. . . . I think Mr. Nook understood what he was doing there at that time as well as he did any time I ever saw him, and I have known him for twenty years."

Appellant Gust Nook testified that in the summer of 1917 he had a conversation with his father "with reference to a will he had made. My wife was there and I believe my daughter. I came in the house and he commenced crying awful hard, and I say, 'Father, what is the matter?' 'Well,' he says, 'they made me change the will.' And I asked him who done it, who was the cause of it, and he said it was Andy Speigel and George Winkler came down to make him change it."

Minnie Nook, daughter of appellant, testified: "I was at the home of my grandfather about two or three weeks before he died. He was feeble; I was there two or three weeks after he made the will. He told us about making the will; he said, 'I was forced to make a will, they made me do it.' He cried like a child that day."

Frank Nook, a son of the appellant, and John Nook also testified to the effect that the deceased had cried and told about having to change the will.

We have examined in detail all of the testimony as disclosed by the record which was before the trial court when the demurrer was interposed. The foregoing constitutes the most salient features of the evidence bearing upon the question of undue influence. As said by Fox, J., in *Winn v. Grier*, 217 Mo. l. c. 459: "The influence exercised upon a testator sufficient to invalidate his will must be of such a nature and character as amounts to overpersuasion, coercion or force, destroying the free agency or will power, as contradistinguished from merely the influence of affection or attachment or the desire of gratifying the wishes of one beloved, respected and trusted by the testator." In the instant case there was no evidence as to any coercion having been exerted at or prior to the time the will was executed, and the only approach to proof of undue influence was the testimony of parties in interest as to statements made by the deceased subsequent to the time the will was made. This evidence, in our judgment, was lacking in substantiality. Such being the case it was the duty of the court to direct a verdict for the respondents, proponents of the will. [*Goedecke v. Lindhorst*, 278 Mo. 504; *Southworth v. Southworth*, 173 Mo. l. c. 73; *Spencer v. Spencer*, 221 S. W. 58; *Defoe v. Defoe*, 144 Mo. 458.]

IV. Appellant finally contends that the court erred in holding that there was no evidence of mental incapacity, insisting that the mind of the deceased was affected.

Testamentary Capacity. From the testimony hereinbefore reproduced it is patent that such insistence is wholly devoid of merit. And a close scanning of the record fails to reveal any evidence upon which such claim could successfully be predicated.

Dr. Richards, a practising physician of over twenty years experience, who had given nervous disorders particular consideration, and who had spent two years in a hospital and insane asylum at St. Louis, testified that he had known the deceased for four or five years and had

treated his wife prior to her death; that he often observed Mr. Nook and stopped to talk to him; that he had visited him professionally in April, 1918, and his mental condition was good; that "he always knew me, knew what I had come for, and he told me what he thought I could do, and so forth. . . . This paralysis that we spoke about does not have any tendency to affect the mind much, until near the end. Of course, his vitality grows low and the mind might be affected some, but as I remember him he was clear up to the last. . . . His digestion and assimilation were pretty good. He couldn't have been as strong and vigorous in that respect and yet be mentally unbalanced, because he was not."

We are constrained to rule the point against appellant.

Having concluded the several questions presented by appellant, and entertaining the views herein expressed, it follows that the judgment of the trial court should be affirmed.

It is so ordered. All concur.

SUSAN A. PARKER v. AETNA LIFE INSURANCE
COMPANY, Appellant.

Division One, July 11, 1921.

1. **LIFE INSURANCE: Suicide: Laws of California: Valid Provision.** Where the substantive rights of the parties are governed by the laws of California, where the parties resided, the life insurance policy was made and delivered and the insured died, a provision in the policy that it should be void in case the insured committed suicide is valid, in a suit brought on the policy of the beneficiary in the courts of Missouri, there being no statute of California prohibiting or making void such a provision.
2. ———: ———: **Burden of Proof.** Where an ordinary life insurance policy contains a valid provision that if the insured shall within one year commit suicide, sane or insane, then such policy

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shall be null and void, the burden of proof that the insured did commit suicide is upon the insurance company, for suicide is an affirmative defense that must be both pleaded and proved; and though the policy contains the provision that suicide, "sane or insane," shall avoid the policy, the burden still rests upon the company to show that the insured designedly, and not accidentally, killed himself, for suicide is the act of designedly destroying one's own life.

3. ———: ———: **Peremptory Instruction: Circumstantial Evidence.** Where the evidence as to the manner of the insured's death is wholly circumstantial, suicide cannot be declared by the court, as a matter of law, unless the circumstances exclude every reasonable hypothesis except suicide.
4. ———: ———: **Plaintiff's Admissions: Wholly Circumstantial.** The answer to the contention that the evidence of the manner in which the insured took his own life is not all circumstantial, because the plaintiff herself admitted that the insured committed suicide, is her denial that she ever made such admission. Besides, her admissions to that effect in the proof of death made to other companies, and in statements by her on other occasions, if made, are but conclusions drawn from the circumstances surrounding the insured's death, and are not absolutely binding upon the jury, but it is the duty of the jury to arrive at the ultimate fact as to whether or not the insured did commit suicide, from all the facts and circumstances, including the admissions, if any, made by her; and the weight to be attached to her admissions, in view of her hysterical condition, at the time she witnessed the tragedy and when she is said to have made such admissions, is likewise a question for the jury.
5. ———: ———: **Drunken Man.** Where the discharge of the automatic pistol may as well have happened from the careless conduct of a drunken man as from an intentional act, and a door shut off from view the exact manner in which the pistol was discharged and prevented definite knowledge, and everything in his business and conduct prior to the time he became intoxicated indicated a purpose to press forward with energy, it cannot be ruled that all reasonable men would agree that the undisputed facts and circumstances exclude every reasonable hypothesis except suicide.
6. ———: ———: **Presumption.** Where the facts and circumstances are made to appear in evidence, the presumption against suicide, as a presumption of law, disappears, but as a presumption of fact it is and must ever be present with all reasonable men whose duty it is to pass upon the ultimate fact of suicide or accident, where the evidence is all circumstantial.

7. ———: ———: **Instruction: Obscured by Matters Unnecessary to Prove.** An instruction for plaintiff telling the jury that plaintiff is entitled to recover unless they further find that the insured committed suicide, and others for defendant requiring a verdict for defendant if they find he did commit suicide, are not contradictory, should be read together, and clearly present the issue of suicide; and that issue, being the only contested one throughout a long trial, is not submerged or in any wise obscured by the fact that plaintiff's instruction includes matters which plaintiff was not absolutely required to prove, such as whether all premiums required to keep the policy in force had been paid, and that defendant failed to furnish blanks for proof of death and denied liability.
8. **EVIDENCE: What Witness Thought: Corrected.** It is not improper to strike out the answers of a witness beginning with, "I understand," "I thought," "I think," etc.; but if there is any error in striking them out, appellant cannot complain when the same answers were brought before the jury, in their full comprehensiveness, by respondent's evidence on cross-examination.
9. ———: **Powder Burn; Distance of Pistol from Wound: Non-Expert Matter.** The witness, after stating that the wound in the deceased's forehead was very dark and looked like a powder-burn, and that for five years he had investigated wounds caused by fire arms and had probably investigated more than a hundred murders and suicides, was asked to state whether he was able to state, from the condition of the wound and the discoloration, where the muzzle of the pistol was with reference to the head at the time it was discharged. He answered that he could not "tell absolutely; I cannot tell in inches where the gun was." Asked for his best judgment, he replied that his judgment from the condition of the wound, was that "the distance was very close to the head, within a foot—twelve inches," and this last answer, over appellant's exception, was stricken out. *Held*, that the witnesses had stated all the facts on which his conclusion was based, the distance from the wound when the pistol was fired was not a matter of expert knowledge, the jury could determine the distance as well as could the witness, and no error, certainly no reversible error, was committed in excluding that part of the answer stricken out.
10. ———: **Inference: Happy Life: Conclusions: Waiver.** In a suit on a life insurance policy, where the defense is suicide, testimony that the home of the insured was a very happy one, that he and his wife and children were very devoted to each other, that he was very cheerful and optimistic, and that from observation and experience in seeing him he had a very happy outlook on life, is not to be considered as mere conclusions of the witnesses, but

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an inference necessarily involving certain facts which may be stated without the facts, the inference being equivalent to a specification of the facts. And where appellant's counsel, on cross-examination of the witnesses, and of plaintiff and other witnesses, proved the same inferences, the testimony in no way injured appellant's cause, and no reversible error could in any even be predicated upon its admission.

Appeal from Jackson Circuit Court.—*Hon. Thomas J. Seehorn*, Judge.

AFFIRMED.

J. C. Rosenberger and McVey & Freet for appellant.

(1) The insurance contract was made, executed and delivered in the State of California, and is governed by the laws of California. The law of that State was duly pleaded and proven. (a) The policy contains the following provision: "If insured shall commit suicide within one year from the date hereof this policy shall be null and void." This condition is valid under the law of California. *Dennis v. Union Mutual Life Ins. Co.*, 84 Cal. 570. (b) The policy was issued July 11, 1914, and the insured committed suicide February 10, 1915; within one year from date of the policy. (2) This case is to be considered under the following rule, viz.: "When the reasonable probabilities from the evidence all point to suicide as the cause of death, so as to establish it, in the light of reason and common sense, with such certainty as to leave no room for reasonable controversy on the subject, a jury should not be permitted to find to the contrary and have such finding stand as a verity in the case, but the question should be decided by the court as one of law." *Brunswick v. Acent. Assn.*, 278 Mo. 154, 273, 213 S. W. 50, quoting with approval from *Agen v. Ins. Co.*, 105 Wis. 218, 80 N. W. 1020; *Mockowik v. Ry. Co.*, 196 Mo. 550, 567; *Richey v. Woodmen*, 163 Mo. App. 235; *Newland v. M. W. A.*,

168 Mo. App. 311; *Howes v. Trav. Men's Assn.*, 241 Fed. 278; 7 *Cooley's Briefs on Ins.*, 3264; *Hardinger v. Modern Brotherhood*, 103 N. W. (Neb.) 74. Mere surmise and conjecture, unsupported by evidence, affords no valid ground for a verdict. *Spiro v. Transit Co.*, 102 Mo. App. 250, 262; *Bates County Bank v. Ry. Co.*, 98 Mo. App. 330; *More v. Ry. Co.*, 28 Mo. App. 622; *Peck v. Ry. Co.*, 31 Mo. App. 126; *Roberts v. Ry. Co.*, 56 Mo. App. 64. (3) The presumption against suicide has no place in the presence of the actual facts. The presumption ceased to exist in the face of plaintiff's story of the suicide. (a) As the facts were established by the undisputed testimony; by plaintiff's own evidence and admissions, this court, in determining whether suicide was established as a matter of law, will not take into account the presumption against suicide. *Mockowik v. Ry. Co.*, 196 Mo. 550, 571; *Guthrie v. Holmes*, 272 Mo. 215; *Brunswick v. Accident Assn.*, 278 Mo. 154; *Andrus v. Business Mens' Acc. Assn.*, 223 S. W. 74; *Packing Co. v. Railroad Co.*, 196 S. W. 406; 1 *Jones on Evidence*, sec. 10-F, p. 74; *Galpin v. Page*, 85 U. S. 350, 365, 21 L. Ed. 959; 9 *Ency. Evidence*, sec. 6, p. 885; *Erhart v. Dietrich*, 118 Mo. 418; *Myers v. City of Kansas*, 108 Mo. 480; *Winter v. K. of P.*, 96 Mo. App. 1; *Moberly v. K. C. Ry. Co.*, 98 Mo. 183; *Keller v. Over*, 136 Pa. St. 20; *Supreme Tent v. King*, 142 Fed. 678. As the presumption against suicide has no place in the consideration of the evidence, this appeal is to be determined by the same rules which apply to the ordinary inquiry on appeal as to whether the plaintiff has made a case for the jury, i. e., whether suicide was established as a matter of law. And that rule is as expressed in the authorities cited in point. (4) The undisputed evidence clearly established suicide as a matter of law, and the court erred in refusing defendant's requested peremptory instruction and erred in submitting the case to the jury over the objections of the defendant; and erred in overruling defendant's motion for new trial, and especially paragraphs

1, 2, 6-11, and erred in overruling defendant's motion in arrest of judgment. (a) The verdict is the result of passion and prejudice on the part of the jury. (b) The verdict in this case is without the slightest evidence to support it. It is a travesty on justice; the overthrow of reason; the clear result of passion and prejudice on the part of the jury, and without legal cause or excuse. (c) There is no theory of accident based on the evidence, or to be inferred from the evidence, which the reasonable mind of this court can for a moment entertain. *Richey v. W. O. W.*, 163 Mo. App. 235, 247. (d) There is no conflict in the evidence; it all points clearly and unmistakably to death by suicide. Any other conclusion would outrage all reason. To reach any other conclusion one must go outside of the record and resort to fanciful conjecture or speculation, which is not permissible. *Hardinger v. M. B. A.*, 103 N. W. 74; *Agan v. Ins. Co.*, 105 Wis. 217, 80 N. W. 1020. (5) The court erred in giving in charge to the jury plaintiff's requested instruction number one. (a) It was the duty of the court to clearly and fairly present the issue of suicide, which was the only issue in the case. This was not done in the instruction. It directed the jury's attention to feigned and false issues, and away from where the shoe actually pinched. It belittled, subordinated and submerged the issue of suicide and made of feigned issues the prominent and controlling issues, and diverted the mind of the jury from the real and only issue, i. e., that of suicide. The defendant was entitled to a fair presentation of that issue, and was entitled to have the jury's mind focused on and not diverted from the issue of suicide. The instruction was most prejudicial and the giving of it was flagrant error. *Strother v. Milling Co.*, 261 Mo. 22. (b) The definition of "burden of proof" is erroneous. It is the definition of "preponderance of evidence." This error was prejudicial. (c) The plan of obscuring the issue by putting something else forward to talk about is no

working theory in the administration of justice. *Strother v. Milling Co.*, 261 Mo. 22; *Sooby v. Postal Tel. Co.*, 217 S. W. 877; *Ins. Co. v. Walker*, 67 Ark. 147. (d) Where the evidence renders it doubtful in the mind of the court as to whether the verdict was right the instructions given must be accurate. *Black v. Black*, 190 Ill. App. 559; *Foley v. Ry. Co.*, 179 Mich. 586; *St. Louis Elec. Ry. Co. v. Groves*, 97 S. W. 1084; *City of Lafayette v. Ashby*, 8 Ind. App. 214. (e) Defendant's instructions cannot be relied upon to cure errors in plaintiff's instructions. (6) The court erred in excluding competent, relevant and material evidence offered by the defendant. (a) Admissions against interest made by plaintiff to her maid Anna Williamson, wherein plaintiff stated that her husband had committed suicide. The court erroneously held that the statement that Parker committed suicide, was merely an opinion and conclusion of the plaintiff, and hence incompetent. The evidence was competent, and its exclusion was prejudicial error. (b) Exclusion of the evidence of expert witness Cato that, judging from the powder burns and the wound, the revolver, in his opinion, was discharged close to the head of the deceased. The court erroneously held that the question called for a speculative conclusion and was incompetent. (7) The court erred in admitting in evidence over the objections of the defendant, the conclusions and opinions of witnesses as to the happy home life, mental state or state of mind of the deceased, and his disposition.

Haff, Meservey, German & Michaels and Humphrey, Boxley & Reeves for respondent.

(1) There was no proof that the insured committed suicide; on the contrary the great preponderance of the evidence showed the death to have been accidental; and appellant's request for a peremptory instruction was properly overruled. *Reynolds v. Casualty Co.*, 274 Mo.

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83; *Prentiss v. Ins. Co.*, 225 S. W. 695; *Brunswick v. Cas. Co.*, 278 Mo. 154; *Andrus v. Accident Assn.*, 223 S. W. 70; *Gooden v. M. W. A.*, 194 Mo. App. 666; *Printz v. Miller*, 233 Mo. 47; *Supreme Lodge v. Beck*, 181 U. S. 48, 45 L. Ed. 741; *Home Ben. Life Assn. v. Sargent*, 142 U. S. 691, 35 L. Ed. 1160; *Tuepker v. W. O. W.*, 226 S. W. 1002; *Remfry v. Ins. Co.*, 196 S. W. 775; *Grey v. Forresters*, 196 S. W. 779; *Pagel v. Cas. Co.*, 158 Wis. 278, 148 N. W. 878; *Bacon on Life & Accident Ins.* (4 Ed.), sec. 438. (2) The court did not err in giving respondent's instruction number one. *Morgan v. Mulhall*, 214 Mo. 451, 462; *Stewart v. Mason*, 186 S. W. 578; *Printz v. Miller*, 233 Mo. 47; *Brown v. Assurance Co.*, 45 Mo. 221; *Brown v. Assurance Co.*, 45 Mo. 221; *Keeton v. National Union*, 182 S. W. 798; *Lange v. Mo. Pac. Ry. Co.*, 208 Mo. 478; *Owens v. Railway*, 95 Mo. 181; *Colburn v. Krenning*, 220 S. W. 934; *Meadows v. Ins. Co.*, 129 Mo. 97; *Sonnen v. St. L. Transit Co.*, 102 Mo. App. 271; *Burton v. Ins. Co.*, 96 Mo. App. 204; *Burgwyn v. Whitfield*, 81 N. C. 261; *Berry v. Railroad*, 214 Mo. 593, 604; *Ellis v. Met. St. Ry.*, 234 Mo. 679; *Patterson v. Evans*, 254 Mo. 304; *Reynolds v. Casualty Co.*, 274 Mo. 83, 86; *Mockowik v. Railroad*, 196 Mo. 550, 568. (3) The court did not err in excluding certain questions asked witness Williamson. *Baker v. Contr. Co.*, 223 S. W. 45; *Meeker v. Met. St. Ry.*, 178 Mo. 187; *State v. Brennan*, 75 Mo. App. 176; *Stephenson v. Atlantic Co.*, 230 Fed. 20; *Hicks v. H. & St. J. Ry.*, 68 Mo. 329. (4) The court did not err in sustaining objections to certain questions asked witness Cato. *Gavish v. Ry.*, 49 Mo. 274; *Railway v. Stock Yds.*, 120 Mo. 541; *Koenig v. Railroad*, 173 Mo. 698; *Benjamin v. Railroad*, 133 Mo. 274; *Lee v. Knapp*, 155 Mo. 610; *McAnany v. Henrici*, 238 Mo. 103; *Helfenstein v. Medant*, 136 Mo. 595; *Bradley v. Ry.*, 64 Mo. App. 475; *Gates v. Ry.*, 44 Mo. App. 488; 22 C. J. 536; *Kerr v. M. W. A.*, 117 Fed. 593; *Inghram v. National Union*, 103 Iowa, 395. (5) It was not error to admit evidence of deceased's health, disposition, state of mind, and home

life. *Laessig v. Protec. Assn.*, 169 Mo. 272, 274, 276; 1 C. J. 499; 2 *Bacon on Benefit Soc. & Life Ins.* (3 Ed.) sec. 336A; *Prov. Assn. Soc. v. Wayne*, 93 S. W. 1049; *Com. v. Trefethen*, 157 Mass. 309; *Reynolds v. Cas. Co.*, 274 Mo. 91; *Pfeiffer v. Sup. Tribe*, 191 Mo. App. 38; *Bowman v. Acc. Co.*, 124 Mo. App. 477; *Hunt v. Order of Pyramids*, 105 Mo. App. 41; *Kerr v. M. W. A.*, 117 Fed. 593; *Mut. Life v. Miller*, 92 Fed. 63; *Met. Ins. v. Maddox*, 127 S. W. 503; *Mut. Life v. Tillman*, 84 Tex. 31; *Furbush v. Cas. Co.*, 131 Mich. 234; *Fulton v. St. Ry. Co.*, 125 Mo. App. 239, 244; 12 *Am. & Eng. Ency. Law* (2 Ed.), 490; *Eyerma v. Sheehan*, 52 Mo. 221; *Partello v. Ry.*, 217 Mo. 645, 655; 1 *Wharton on Evidence* (3 Ed.), sec. 510; *Reardon v. Ry.*, 215 Mo. 137; *Schultz v. Ins. Co.*, 152 Wis. 537; *Morrison v. State*, 40 Tex. Crim. 473, 51 S. W. 358; *Pullman Co. v. Hoyle*, 52 Tex. Civ. App. 534, 115 S. W. 315; *State v. McKnight*, 119 Iowa, 79, 93 N. W. 63, 64; *Miller's Est.*, 36 Utah, 228; *Ry. v. McLendon*, 63 Ala. 275; 22 C. J. 614; *Cady v. F. & C. Co.*, 134 Wis. 322, 17 L. R. A. (N. S.) 260; *Bank v. Noel*, 94 Mo. App. 498; *Hicks v. Ry.*, 68 Mo. 329; *Warwick v. Elsey*, 47 Mich. 10; *Roe v. Kansas City*, 100 Mo. 190; *State v. Brennan*, 75 Mo. App. 172; *Meeker v. Met. St. Ry.*, 178 Mo. 173, 187; *Baker v. Contrac. Co.*, 223 S. W. 45; *Griebel v. Ry.*, 88 N. Y. Supp., 767.

SMALL, C.—Appeal from the Circuit Court of Jackson County.

This was a suit to recover \$20,000, and interest, the amount of a life insurance policy issued by the defendant company, July 11, 1914, upon the life of Carl S. Parker, in favor of his wife, Susan A. Parker, the plaintiff. The policy was issued in the city of Los Angeles, California, where the insured and his family then resided. The insured died from a gun-shot wound at his home in Los Angeles on February 10, 1915.

The answer was, first, a general denial, and that the insured committed suicide, in contravention of a pro-

vision in the policy, "that if said Carl S. Parker should within one year from July 11, 1914, the date of the policy, commit suicide, while sane or insane, then said policy should be null and void, and defendant should not be liable thereunder." That on February 10, 1915, within said one year from the date of the policy, the said Carl S. Parker did commit suicide by firing with his own hand a bullet from his pistol into his brain. There was a further allegation in the answer, that under the laws of California, where the contract was made and the assured and beneficiary lived, and where the assured died, such a clause in the policy against suicide, sane or insane, was valid, and a breach thereof avoided the policy. Also, that a part of the premium, \$540.40, remained unpaid.

The reply put the affirmative defenses in issue.

The plaintiff offered the policy in evidence, a premium receipt, showing that the premium was paid until the 11th day of January, 1915. (The next premium was due the next day after insured's death). Defendant's counsel then admitted the insured's death and that defendant was making no point that notice of death was not given in due form. Plaintiff also introduced in evidence a letter from defendant, dated May 8, 1916, stating that defendant did not forward any blanks upon which Susan A. Parker could make proof of the death, for the reason that the policy had become absolutely null and void by reason of the suicide of the insured. Plaintiff then rested.

Defendant then introduced its evidence, after which, plaintiff offered evidence in rebuttal.

The salient facts, which the evidence tended to prove, are substantially, as follows:

The insured was about thirty-eight years of age, married, and had three children—two girls, seven and eight years old, and a boy eleven years. He had lived in Los Angeles about eight years. His home life seemed to be of the happiest. He was a most kind and affectionate son, husband and father. He was in good health, and

a fine specimen of man—full of life and energy—his associates testifying to his great capacity for work, his kindness to and thoughtfulness of others, and that he was about the “best salesman in Los Angeles.” But he was a “good fellow” and sometimes addicted to drink, but not enough to make any impression on his health or strength. He was, in other respects, a man of good habits and orthodox in religious belief. He was in the wholesale plumbing-supplies business, which had prospered until within a comparatively short time before his death, when, on account of the World War, business had fallen off, and he and his associates had considered the advisability of buying or selling out to a competitor. He left home on the morning of his death, February 10, 1915, in his usual happy and cheerful frame of mind, to meet such competitor. They were together negotiating all day, and the result was that his company agreed to buy out the the other company, and to pay them the inventory price of their goods, about \$40,000, in equal payments, in three, six, nine and twelve months after date. The deal was closed sometime in the afternoon. In the meantime, they had taken lunch together and also quite a number of drinks of intoxicating liquor. Defendant’s evidence tends to show that they took more drinks afterwards, perhaps as many as eight or nine up to about six o’clock that evening, when Parker accompanied Col. Lally, president of the competing concern which they had bought out, to his train for San Francisco, where he resided. At that time, Parker was somewhat “lit up,” as Col. Lally testifies, but went with him to his car and tapped on the car-window and waived him good-bye in the best of spirits. As he left the depot, Parker became somewhat playful and jostled one of the “red caps,” who became angered, and Parker gave him a dollar to make amends. From the depot, he was driven to a hotel, where he got shaved, and from there started home in a taxi, but stopped on the way at the California Club, where he drank some champagne, and his friend

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Leeds, who declined to drink with him, suggested to him to take a room and rest a while, before going home, so he could be sobered up a bit. But he refused, and with the assistance of his friend got into a taxi and drove home, where he arrived about 7:20 p. m. He and Mrs. Parker had accepted an invitation to dine that evening at the house of a friend at seven. Mrs. Parker was dressed and waiting and watching for him, when the taxi arrived, and met him at the curb. She observed that he had been drinking, and said to him that it was too late to keep their engagement for dinner. The taxi driver says that she upbraided him in a somewhat angry manner, while she says she only requested him to alight and go into the house with her, when he insisted on going to dinner to their friend's house, "as he was." What happened afterwards, is graphically described by appellant's learned counsel in their brief, as follows:

"She after a time persuaded her husband to get out of the taxi and into the house. He took off his coat and hat in the hall. They went upstairs into their bed room, and she turned to the telephone in the room to call her friends and cancel the engagement. While at the phone she turned and saw her husband standing in front of the chiffonier, looking into the mirror. He held a revolver in his right hand; a pistol which he had placed in the chiffonier drawer on an occasion some two or three weeks before. She screamed, rushed to her husband, snatched the revolver from his hand and ran with it into the hallway. He followed; overtook her in the hall; caught hold of her roughly and threw her down. In the struggle for possession of the revolver she managed to toss it over the banisters on to the stair-landing below. Parker immediately let go his wife and ran to the stairway to secure the revolver. In his haste or owing to the struggle, he slipped or lost his balance and slid down the stairs on his back, feet in air, bringing up on the landing on top of the revolver. Attracted by the screams of Mrs. Parker, a maid (Anna Williamson) ran from the rear into the front

hall downstairs. She saw Parker fall; saw him get up, pick up the revolver and come rapidly down, and thinking he needed assistance she started toward him, but he pointed the gun toward her; she saw the revolver; saw his flushed face, set features and staring eyes, and she instinctively screamed and ran. Parker came on. The wife followed. He turned with the pistol and threatened her, but she still came on. He ran out from the hall and into the dining room, she chasing him, running as fast as she could. He went on through a swinging door into the pantry; the door came to and she could not pass. She pounded on the door frantically with her fists; an instant, and then the shot. She pulled open the door, leaned over the fallen body of her husband, saw a bullet hole, marked with powder burns, in the middle of his forehead; saw the revolver loosely in his right hand; saw that her husband was gone, and fled, screaming, to the neighbors."

The only other witness who saw Parker just before the tragedy was the maid, Anna Williamson, a witness for the defendant, who testified:

"When I arrived at the front hallway I saw Mr. Parker on top of the stairway, and he fell just as I came. He fell on the top stairs and fell to the second landing from the bottom. He slid down the stairs on his back. On reaching the landing he picked up something; at first it looked to me like a piece of wood, and I ran towards him and tried to help him down and I saw it was a revolver, and I ran back to my room again. Mr. Parker didn't say anything. I was frightened because I knew Mr. Parker was in a condition he didn't know what he was doing because of liquor, and I ran because I was afraid he might do bodily harm to me. Mr. Parker was not like himself. He looked like a man under the influence of liquor. His eyes were very staring and face very red; I had never seen him in that condition before. No, he didn't point towards his face; the revolver was more direct at me but I don't think he intended to point at —he just held it that way; I don't know whether he

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intended pointing at anything or not, he was not pointing in any way towards me. Well, think the way he held it it was more pointing to the ceiling. Could not tell correctly what he was pointing at. My thought was he was carrying the revolver very carefully as he went out through the hall, holding it up so that it was not pointed at anybody, but rather holding it up so that it was out of the way, so that it could not hurt me or him or anybody else. That is the way it appeared to me.

"Q. I will ask you if Mrs. Parker did make the statement to you that she thought her husband had committed suicide because he was temporarily insane; did she make that statement to you? A. Yes. I think it was the very first evening, when I was undressing her. When she made these statements she talked as a sane person, but was very excited and nervous."

Shortly after his death, several neighbors and others arrived, and they testified for defendant, as to the position and condition of the body. One (Mr. Huntsberger) said that there was a bullet hole a trifle to the right of the center of the forehead, and a great deal of blood on the pantry and dining-room floors. The bullet hole was midway between the hair line and the eye brows, and there was a slight blackened appearance in the vicinity of the bullet hole, which seemed due to powder burns. The revolver was lying on the floor near his right hand, one chamber was exploded, and the others all loaded. He was lying partly on the left side of his face and body—not quite flat on his face or chest, but more on his chest than his side, his face mostly inclined towards the floor. His right arm seemed to be a little out from his body. He seemed to be lying partly on his left arm. Witness had an indistinct recollection that there was an aperture on the other side of his head towards the base of the brain, but was not clear about that.

Another witness for defendant (a police officer) said: He was lying on his back, his head holding the

swinging door between the dinning room and pantry open four or five inches, and the revolver lay in his open right hand with the handle between the thumb and forefinger. The bullet hole was in the right temple, and the wound looked like a powder burn. The revolver was a double-action, hammerless revolver. "You pull the trigger and it cocks itself, and you pull further and it discharges—by pulling the trigger, it would cock and then fire. One movement back cocks and discharges it." He could smell liquor very prominently about the body.

Another witness for defendant (Dr. Smith) said that the bullet hole was in the forehead; did not remember the exact location—but it was in the forehead between the hair line and the eye brows and between the two temples.

As to the admissions of Mrs. Parker, that her husband committed suicide, testified to by defendant's witnesses: The maid (Anna Williamson) said that after Parker's death, the same night, Mrs. Parker told her she took the revolver away from him, because she thought he would kill himself; that he was standing in the front of the chiffonier looking-glass, and she thought he was going to kill himself right there, and that he looked in the glass to see where to point the revolver.

Three neighbors (the Huntsbergers) testified that Mrs. Parker, when they arrived shortly after the occurrence, kept repeating, "Oh! Why did he do it? Why did he do it?" But they all say, in effect, that she was in an hysterical condition. The maid says she was very much disturbed up to the time of the funeral, and then she collapsed, and was in bed, and was not herself until May following, but that when she made the statement that she thought her husband was going to kill himself, she looked like a sane person, but was "very much excited and nervous."

Defendant also introduced in evidence proofs of death made to the Penn Mutual Insurance Company, dated March 2. 1915, signed and sworn to by Mrs. Park-

er, which stated that the cause of death was suicide, and had attached thereto the certificate of the attending physician, Dr. Guy Cochran, stating that the deceased died by his own hand, and that he believed it must have been an acute mania, also stating that deceased always appeared well, but had been working very hard, and that he had been told by his wife that he had been worried about his health and suffering from severe headaches and sleeping badly. There was also attached to this proof of death, a copy of the coroner's verdict, which stated the coroner found from the testimony adduced before him that Parker came to his death by a "gun-shot wound in the head, suicidal."

Paul D. Robinson testified for defendant, that he was the funeral director, and called the next morning. That he had difficulty in getting Mrs. Parker to talk. About all she would say, at first, was, "What did he do it for?" That afterwards he understood her to say that he picked up the gun and said, "Well, I'll end it all," or words to that effect. That she was, however, "exceptionally hysterical, and was in a very, very nervous condition, and did not act like herself at all." She told him that her husband had been examined by some physician, who told deceased he had a cancer or something. But the witness examined the body, and there was no sign of cancer, nor was it an alcoholic body.

Mr. Baker, a friend of the family, testified for plaintiff that Mrs. Parker told them that Parker had killed himself, but she did not use the word "suicide."

Mrs. Baerthlein testified, for defendant, that she was there the night of Parker's death, and Mrs. Parker was very hysterical.

The plaintiff, Susan A. Parker, testified in her own behalf, in rebuttal. We have detailed, in substance, the greater part of her testimony in the extract which we have heretofore made from the statement contained in appellant's brief. But there are some additional matters in her testimony bearing on the case. She said:

"There was blood on the inside of the pantry door, the side he was on. It was so far up from the bottom of the door that, when the cook washed it off, she had to reach up." (Parker was six feet and one and a-half inches tall). She had a trained nurse the night of Parker's death to take care of her. She did not remember any conversation that occurred that night. "Oh! I don't know what I said." She went to the funeral in an automobile, but was not out of it, and was carried into the automobile. She was in bed after the funeral, and had a trained nurse until about April 1st. All she knows of her physical and mental condition during that time is that she didn't know much. Asked about her condition at the time of the proofs of death to the Penn Mutual Insurance Company, dated March 2, 1915, introduced in evidence by the defendant, she said: "At that time, I couldn't have read anything that was given me. My nervous condition was such that I couldn't read. I did not read anything; I couldn't. I do not know whose writing this is upon here (indicating the Penn Mutual Insurance Company's papers). It is not my writing. I did not authorize any person in the world to make those entries here. I mean this writing above my signature. I never authorized Dr. Guy Cochran to make entries in this document which purport to have been made by him under the heading, 'Attending Physicians' Certificate.' I never saw this writing (Penn Mutual Insurance Company's Proofs of Death) until now. Never authorized anyone to make any attachments (to said papers). Dr. Cochran was not at my home prior to March 2, 1915, or prior or subsequent to March 1, 1915. I never told Dr. Cochran or Mr. Baerthlein or anybody else, that my husband committed suicide. If I had known that any such statement was in there, I would not have signed that document. . . . I never saw Dr. Cochran that I didn't ask him to please get Carl not to work so hard. Mr. Parker did not have any cancer. . . . Mr. Parker did not appear to be worried about anything; nothing

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special; he always took business seriously." She ran after Parker, she supposed, from instinct. "I didn't think a man who had even one drink had any business with a revolver in his hand." "Q. You thought there was a situation of danger? A. Naturally, when you see a man with a revolver in his hand, he is not doing it for pastime." "I signed several papers when I was ill; I didn't know what they were. I stayed in bed and had a physician, Dr. Guy Cochran. He had been our physician for a long time since we went to Los Angeles. He was one of the best known physicians in Los Angeles. Don't remember of making a claim on the Penn Mutual, but remember there was a policy in that company." Mrs. Parker further testified that Parker never said a word from the time he left the taxi-cab until his death. The maid (Anna Williamson) says, he never said a word while she saw him, but "kept his lips closed tight."

The probate court records showed that his estate was a little more than solvent—paid all his debts, some \$18,000, in full (except about \$1,000 due his wife); paid some \$2,400 to his family, and about \$1,200 administrator's fees and attorneys' fees. There were uncollected assets of unknown value turned over to the wife to apply on balance due her.

There were some objections to the admission and refusal of testimony, which will be referred to in the opinion.

At the close of the testimony, the defendant requested the court to instruct the jury "that under the law and the evidence, your verdict must be for the defendant," which the court refused.

The court gave the following instructions for the plaintiff:

"1. The court instructs the jury that if you find and believe from the evidence in this case that the policy in evidence was issued to Carl S. Parker, and that all premiums required by said policy to keep said policy in force until February 11, 1915, had been paid; and that

Carl S. Parker died February 10, 1915, and that defendant refused to furnish to plaintiff forms for proofs of death and denied any liability on the policy, then-you must find a verdict for plaintiff for the face amount of said policy (\$20,000) less the sum of \$540.40 (the amount of two quarterly premiums), upon which balance you should compute interest at the rate of six per cent per annum from such date of the denial of liability, if you so find, unless you should further find and believe from the evidence that Carl Parker committed suicide, and upon that question the court instructs you that the burden of proof is on defendant to prove that he did commit suicide.

“By burden of proof as used in this instruction is meant the greater weight of the credible testimony in the case.

“2. The court instructs the jury that you are the sole judges of the credibility of the witnesses and the weight to be given to their testimony.”

At the request of the defendant, the court gave the following instructions:

“3. In instructing you as to the law of this case, the court admonishes you that you have an important duty to perform in carefully weighing and considering the evidence and applying the law as it shall be given to you in the instructions. You will fail in your duty if you should not look to all the proof and consider it fully, fairly and impartially, and with but one purpose, namely, to arrive at the truth and to do equal and impartial justice, looking only to the law and the proof. You should not allow yourself to be influenced by the fact there is an individual on one side and an insurance company on the other, and it is your duty to put out of your minds any feeling of sympathy, prejudice or partiality for one side or the other. Their rights are equal and the same under the law, and the jury should remember nothing but the law and the evidence are to determine the issues involved. You should satisfy your-

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selves, before returning a verdict, that you fully understand the law and the proof upon which you base your verdict, as your oath places upon you the duty of finding and returning a verdict according to the law and the evidence, and that alone. The rights of the parties under the issues made are submitted to you for your honest determination, and you should weigh and consider all the questions submitted without any feeling of prejudice or partiality one way or the other, and with an honest purpose to reach a correct conclusion under the law and the proof. No juror should assent to a verdict that he does not conscientiously believe a correct one according to the law and the proof. You should discuss among yourselves the matter submitted dispassionately and with minds open to reason and conviction, after the argument of counsel has been heard, without getting up unreasonable antagonism that might interfere with a just, fair and proper consideration of the case. If any juror should happen to know any fact bearing upon this case, either directly or indirectly, he should not act upon it nor communicate it to his fellow jurors. The law requires you to discuss and rely alone for your verdict upon the sworn testimony adduced, and under the law as given you in these instructions.

"4. The court instructs the jury that by the policy sued on it was agreed between Carl S. Parker and defendant that the policy would be null and void if he, the said Carl S. Parker, should commit suicide, while sane or insane, within one year from the date thereof, and such agreement, under the law of this case, is binding on the plaintiff in this suit.

"Therefore, if you believe from the evidence that said Parker committed suicide, while he was either sane or insane, then plaintiff is entitled to nothing under the policy and your verdict must be in favor of the defendant.

"5. If you believe from the evidence that Carl S. Parker for the purpose of ending his life, fired a pistol

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bullet into his brain and killed himself, then under the law, it is your sworn duty to return a verdict in favor of the defendant, whether you believe he was sane or not at the time of the act."

The jury returned a verdict for plaintiff for \$22,602.33, which was the full amount of the policy, less \$540.40 unpaid on the first year's premium, and set up in the answer.

Defendant's motion for new trial being overruled, it appealed to this court.

I. It is not disputed, that the provision in the policy that it should be void in case the insured committed suicide, was a valid provision, because the substantive rights of the parties are governed by the laws of California, where the parties resided, the policy was made and delivered, and the insured died, and there was no statute in that State prohibiting or making void such a provision in the policy. [Prentiss v. Ins. Co., 225 S. W. (Mo.) 695.]

II. But the burden of proof that insured committed suicide was upon the defendant. Suicide was an affirmative defense and was necessarily so pleaded by defendant. The suit was on an ordinary life policy, and not upon an accident policy. So that the manner of the death of the insured—that it was not accidental, but designedly by suicide—was incumbent upon the defendant to allege and prove. In the Century Dictionary, suicide is defined: "1. The act of designedly destroying one's own life." And that: "To constitute suicide at common law, the person must be of years of discretion and of sound mind." But no question is raised as to the sanity of the deceased at the time of his death, nor as to the validity of the provision that suicide, sane or insane, should avoid the policy. Still, in order to be suicide at all, death must have been *designedly*, and not accidentally, inflicted upon himself by the deceased. These propositions are not disputed by either party and are simply

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referred to to show that they are assumed to be true in the consideration and decision of this case.

III. In view of the burden of proof being upon the defendant to prove suicide, sane or insane, under the facts and circumstances in the record in this case, we cannot rule that, as a matter of law, such defense was made out and that the lower court erred in not instructing the jury to return a verdict for the defendant.

Circumstantial Evidence.

In this case, the evidence, as to the manner of the insured's death, is wholly circumstantial, and it is well settled in this State, that where the evidence is wholly circumstantial, suicide cannot be declared by the court, as a matter of law, unless such circumstances exclude every reasonable hypothesis, except suicide. [Bruns-
wick v. Standard Ins. Co., 278 Mo. 154; Reynolds v. Casualty Co., 274 Mo. 83; Prentiss v. Ins. Co., 225 S. W. 695; Andrus v. Accident Assn., 283 Mo. 442, 223 S. W. 70.]

IV. But learned counsel say that the evidence in this case is not all circumstantial, because there is evidence that plaintiff herself admitted that insured committed suicide. The answer to this is, that she denied that she ever told anyone that he committed suicide. Furthermore, her admissions to that effect in the proof of death to other companies and otherwise, if made, were but conclusions from the circumstances surrounding insured's death, stated by her; but such circumstances being also before the jury, her conclusions were not absolutely binding upon the jury, and it was the duty of the jury to arrive at the ultimate fact as to whether or not insured did commit suicide, from all the facts and circumstances in evidence, including, as one of the circumstances, the admissions, if any, so made by the plaintiff. The weight to be attached to such admissions, in view of her condition, mental and physical, at the time she witnessed the details of the trag-

Plaintiff's Admissions.

edy and when she is said to have made such admissions, was also a matter for the jury. In this connection, what is said by Justice BREWER in *Supreme Lodge v. Beck*, 181 U. S. l. c. 56, is apposite: "The plaintiff in her proofs of loss stated that the deceased came to his death by suicide, and to that effect was the verdict of the coroner's jury. With respect to this matter the court charged that there was no estoppel; that the plaintiff could explain the circumstances under which she signed the statement, and that while standing alone it would justify a verdict for the defendant, yet if explained and the jury were satisfied that the death did not arise from suicide, she was not concluded by this declaration. We see no error in this ruling. None of the elements of estoppel enter into the declaration. The condition of the defendant was not changed by it, and if under a misapprehension of facts she made a statement which was not in fact true, she could explain the circumstances under which she made the statement and introduce testimony to establish the truth."

So that all the evidence as to whether or not the deceased committed suicide, was circumstantial.

V. Such being the case, can it be said that all reasonable men would agree that the undisputed facts and circumstances in this case exclude every reasonable hypothesis except suicide? Or, as stated in the Brunswick Case, 278 Mo. l. c. 173: Are they "such and of such weight as to negative every reasonable inference of death by accident?" Tested by that rule and by the precedents in this State, we must answer in the negative.

There was no evidence of previous threats of suicide and no motive for it in his family or business relations. He had in fact that very day consummated the purchase of a competing establishment, which gave his business, which had begun to languish, owing to the World War, a new lease of life. This shows his intention to press forward in the race of life with more energy,

courage and confidence, than before. Upon the consummation of this deal, probably in celebration of it he overindulged in the flowing bowl and lost control of himself and his actions.

He said no word, and never aimed the pistol at himself, from the time he entered the house until he entered the pantry. The pantry door shuts out from view the exact manner in which the pistol was discharged, and prevents any definite knowledge from reaching us whether he did or did not commit suicide. It is mere speculation—but the circumstances of the blood on the pantry door about even with his head, that the wound was in the center of the forehead and not in the right temple, are consistent with the pistol, which needed no cocking, but only a pull on the trigger to explode it, going off accidentally, while he in his unsteady mental and physical condition, obstructed his wife's entrance to the pantry, by holding or trying to hold, with the pistol in his hand, the swinging and swaying door against her, and upon which she was pounding with her fists.

But appellant's learned counsel insist that, because Mrs. Parker made frantic efforts to secure the weapon, and he apparently made equally frantic efforts to take it from her, and secured it against all her efforts and protestations, that it is conclusive to reasonable minds that he intended to secure it for the purpose of committing suicide. This leaves out of the problem the important feature that he was intoxicated and all antecedent circumstances, as well as the strong presumption of fact against suicide. In his hilarious condition at the railway station, he playfully, but perhaps roughly, jostled the "red cap" and assauged his wounded feelings with a dollar. Who can prophesy what vagaries or rough, reckless or wild pranks he might indulge in when he reached home after drinking more champagne at the California Club? Nor is the fact that the plaintiff pursued him frantically to take the revolver from him, conclusive that she even thought he would commit suicide, that is, de-

signedly and purposely take his own life. As the plaintiff says, she might have instinctively rushed forward, because she was greatly frightened, and she did not know but that he might injure himself, because, as she said, "a man, who had even one drink, has no business with a revolver in his hand," and that, "naturally, when you see a man with a revolver in his hand, he is not doing it for pastime." So it appeared to the maid, that he was holding the revolver up toward the ceiling in such a manner as not to hurt her, himself, or anybody else, as he went through the hall to the dining room; but she fled from him, because he had a revolver and was in liquor and did not know what he was doing, and, therefore, might injure her.

Of course, there was evidence, in this case, of suicide sufficient to go to the jury, but it was far from that conclusive character which authorizes the court to declare, as a matter of law, that the defense of suicide was sustained.

We have some notable cases in this State. In Reynolds v. Casualty Co., 274 Mo. 83, the evidence was much more conclusive of suicide than in the case at bar. In that case, the deceased was a traveling salesman. He went to a hotel, registered under an assumed name, asked for a well-lighted room on one of the upper floors, but there being none, took a room on the first floor above the lobby. The next morning he was found dead in the bath room with the door locked, his body lying on the floor, a Colt automatic pistol was found in the bowl of the washstand near by, above which was a looking-glass; two shells had been exploded, and one ball was embedded in the bath room door about five feet and a-half from the floor. There was one bullet hole in the back of the head near the base of the skull, another in the lower part of the forehead between the eyes, another in the cheek near the lower jaw. It was strongly urged in that case that two shots having been fired and taken effect in the head of the deceased, the proof of

suicide was conclusive. Yet, this court held that owing to the strong presumption against suicide, based upon the strong love of life in every human being, it was a question for the jury, whether the deceased purposely or accidentally killed himself.

In *Brunswick v. Ins. Co.*, 278 Mo. 154, the tenth paragraph of the syllabus fairly states the facts and ruling of the court, as follows: "Where defendant put in no evidence at all, and no affirmative facts to show suicide were adduced, save and except the proven facts that a few minutes before insured was found in a dying condition, due to his having taken cyanide of potassium, he was seen to fold up a handkerchief, that after his death, a large quantity of this poison was found in the handkerchief in his pocket, and that he had this poison in his pocket for several days, and knew what it was, the court could not say, as a matter of law, that the evidence was sufficient to overcome the presumption against suicide."

In the case in the Supreme Court of the United States of *Supreme Lodge v. Beck*, 181 U. S. at page 53, the court said:

"Whether the deceased committed suicide was a question of fact, and a jury is the proper trier of such questions. It is not absolutely certain that the deceased committed suicide. The following are the facts, at least from the testimony, the jury was warranted in finding them to be the facts: The deceased and his wife had been married some six years. They had one child, a little girl of whom he was very fond. They lived happily together except when he was drinking, and then he became irritable, and they quarreled. For six weeks prior and up to four days before his death he had not been drinking. The only evidence that he ever thought of taking his life is the testimony of a domestic, who had worked in the family for two or three years but had left a year and four months before his death, that when once she called his attention to the fact that he

was drinking heavily, his reply was that 'a man that has as much trouble as he had, the sooner the end came the better,' and a similar remark at another time, that such a man 'would be better off dead than living.' Two days before his death his wife left her home and went to a neighbor's. He tried to persuade her to return, but she refused to do so while he was drinking. There were two guns in his house, one a single-barrel shot-gun, belonging to his wife, and one a double-barrel shot-gun, his own. The domestic then employed had concealed both by direction of Mrs. Beck. The day before the killing he went to a store in the city and hired a gun. He was at home the day of his death, sleeping a good deal. Late in the afternoon he got up and called for his gun, saying he was going hunting. Evidently he got his own gun or the gun he had hired the day before. In the evening he went to the house where his wife was staying and sought admission. A friend was with him. Admission was refused. He became demonstrative, and a call was made for a policeman, who soon came in a hack. The breaking of glass suggested that he had gotten into the house. The policeman went inside, when the hack driver who had brought the policeman, called out that the deceased had gone into the back yard and into a water closet. The hack driver heard him go into the closet, and after a minute or so heard him step outside, and immediately the gun was discharged, and on examination he was found with the upper part of his head shot off. It was so dark that no one saw the circumstances of the shooting. Whether it was accidental or intentional is a matter of surmise. The undertaker testified that there was a mark on the face under the left eye as though the face had been pressed to the barrel of the gun; that there were no powder marks on the face as there would have been had the gun not been held close to the skin. But whether that mark, if it came from the gun, was because he deliberately placed his head on the top of the gun, or, as a

drunken man, stumbled and fell against it, is a matter of conjecture. There was a dispute as to whether, in view of the length of the gun and the shortness of his arm, he could have reached the trigger without the aid of a pencil or piece of wood, no trace of which was found, or indeed looked for. Under those circumstances, it is impossible to say that beyond dispute he committed suicide. The discharge of the gun may as well have happened from the careless conduct of a drunken man as from an intentional act. At any rate, the question was one of fact, and the jury found that he did not commit suicide, and after its finding has been approved by the trial court and the Court of Appeals, we are not justified in disturbing it."

In the Reynolds Case, 274 Mo. l. c. 101, this court said:

"That firearms are treacherous and dangerous, and that playing with them is liable to result unexpectedly, is proverbial." And at page 102: "There are many ways in which a loaded and cocked pistol might be discharged while pursuing its own erratic course."

In the case before us, the pistol cocked and discharged itself by simply pulling the trigger. In this case, we have not only the vagaries of a loaded automatic pistol, as in the Reynolds Case, but we have it in the hands of a man whose mind and body were full of vagaries from drink, as in the Beck Case—a dangerous combination and quite as likely to cause death by accident, as by design.

We rule, the court properly refused a peremptory instruction for the defendant.

VI. But it is earnestly argued by appellant's learned counsel that, in as much as the facts and circumstances surrounding the insured's death, appear in the evidence, the court in passing, as a matter of law, upon the question of suicide, cannot indulge in the presumption against suicide, because when the facts appear, the presumption vanishes, citing the Brunswick

Presumption.

Case, the Prentiss and other cases decided by this court. But this is a misconception of the rulings in those cases. Both those cases, and the Reynolds Case, rule, that in passing upon the question of suicide, as a matter of law, when all the evidence is circumstantial, the court will do so with the presumption against suicide ever in its mind. All reasonable men would do so. Although we decided in those cases that it would be error for the court to instruct the jury that, as a matter of law, there was such a presumption (the facts and circumstances appearing), still, we have no doubt that it would be entirely proper for counsel in their argument to urge, and for the jury to consider in reaching their verdict, that the love of life is the strongest instinct of a human being, and no man ought to be presumed to commit suicide—not, however, as a matter or presumption of law, but, as a matter and presumption of fact, of such probative force as the facts and circumstances in the particular case would justify and warrant in the opinion of the jury. When the facts and circumstances appear, the presumption against suicide, as a *presumption of law*, disappears, but, as a presumption of fact, it is and must be ever present with all reasonable men whose duty it is to pass on the ultimate fact of suicide or accident, where the evidence is all circumstantial. Such is the doctrine of our decisions heretofore rendered and above referred to and we must adhere to that doctrine.

VII. The objections to plaintiff's instruction numbered 1 are not well taken. They are, that it submitted false issues to the jury, to-wit, whether all premiums required to keep the policy in force were paid, and that defendant failed to furnish blanks for
Instruction. proofs of death, and denied liability on the policy, whereas there was no controversy on these points, for the reason that defendant did not contest the policy on any ground except suicide. Also, that said instruction did not clearly authorize a verdict for the defendant, even in case said Parker committed suicide.

A fair reading of said instruction authorized a verdict for plaintiff *unless* the jury should further find that the insured committed suicide. Two instructions for the defendant required a verdict for the defendant, if the jury found he did commit suicide. All the instructions must be read together. When so read, the issue was most clearly presented. There was no contradiction between the instructions. The plaintiff could recover, unless insured committed suicide (that is, unless defendant made good its defense), under plaintiff's instruction; and could not recover, if he did (that is, if defendant made good its defense), under defendant's instructions. For several days evidence had been introduced before the jury on the question of suicide. That issue was so prominent in the evidence and in the instructions, that it could not possibly have been submerged, nor in any way obscured, by the matters which were contained in plaintiff's instruction, which plaintiff was not absolutely required to prove. Said instruction did not divert the jury away from the issue of suicide. Said instruction also properly told the jury "that the burden of proof is upon the defendant that he did commit suicide." And, that "by burden of proof is meant the greater weight of the credible testimony in the case."

The objections leveled at this instruction are not well taken.

VIII. It is true, that the court, on plaintiff's motion, struck out the answer of defendant's witness, Williamson, that she *understood* Mrs. Parker said, the cause of her husband's death was suicide; also sustained plaintiff's objection to the following question:

Evidence. "Q. State whether or not Mrs. Parker told you that her husband Carl Parker had committed suicide;" and, struck out her answer: "A. I *think* she used the word suicide, if I recollect right;" also struck out subsequent answers that said witness *thought* Mrs. Parker had told her that her husband had committed suicide while temporarily insane; and one answer, that she did make such

statement to her. But subsequently appellant's counsel asked, and the witness answered without any objections, questions, as follows: "Q. Now, in the light of Mr. Reeve's objections, I will ask you if Mrs. Parker did make the statement to you, that she thought her husband had committed suicide, because he was temporarily insane. Did she make that statement to you? A. Yes." Also, as follows: "Q. And you say, you don't remember definitely whether she made that statement the first night following his death or sometime during the first two weeks following his death. Is that right? A. I think it was the very first evening, but I could not remember correct—I think it was the first evening when I was undressing her. Q. Where were you at the time she made that statement? A. In the bed room."

Most, if not all, the prior rulings of the court against appellant were obviously correct, because the questions were either leading and the answers simply, "I think," or, "I understood." But however that may be, the diligence of counsel for appellant was finally rewarded by securing a positive and favorable answer from the witness to the questions previously ruled out, and, thus, the prior errors of the court, if any, were corrected, and appellant has no ground of complaint here on account thereof.

IX. The witness, Cato, for defendant, who saw the body shortly after death, testified, as follows: That it was very black around the wound. Could not say positively what it was, but it looked to witness as though it was powder burned. The dark color covered an area about the size of a dollar. It gave the appearance of where a man had a severe bruise, and probably a half hour afterwards it was discolored. It was a dark color. It was real dark around the bullet hole. Did not examine the discoloration to determine whether or not it was a powder burn. Witness had a great deal of experience in respect to seeing wounds on persons caused by firearms. Worked

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on the Call Motor for five years investigating. During that time he probably investigated one hundred or more murders and suicides. Witness was then asked, whether he was able to state, from the condition of the wound and its discoloration, where the muzzle of the revolver was with reference to the head, at the time the gun was discharged. "A. I cannot tell absolutely, I cannot tell in inches where the gun was. Q. What is your best judgment? A. My judgment, from the condition of the wound, is that the discharge was very close to the head, within a foot—twelve inches." The last answer, on plaintiff's motion that the question called for a pure conclusion, was stricken out. Appellant assigns error on this action of the court. We think, however, no error was committed. The witness had stated all the facts on which his conclusion was based, and that he could not tell absolutely, nor in inches, how far away the gun was when it was fired. It was not a matter of expert knowledge, and the jury could tell as accurately as could the witness. No error, at least, no reversible error, as to defendant was committed in excluding this evidence. [Kerr v. M. W. A., 117 Fed. 596, (LOCHREN, J.).]

X. Appellant objected to the testimony of Baker, that he considered the Parker home a very happy home,

that they were all very devoted to each other;

Inference. of Baerthlein, that Parker was very cheerful

and optimistic; of Dr. Smith, that from his observation,

Mr. Parker had a very happy outlook on life; of Bloom,

that from his experience in seeing them, "their life seemed to be the very sweetest." The ground of the ob-

jection was, that these witnesses stated conclusions or opinions. But such inquiries do not call for expert

opinion, and said opinions on the subject which they re-

late to, come within the rule that: "That an inference nec-

essarily involving certain facts, may be stated without

the facts, the inference being equivalent to a specification

of the facts. . . . In other words, when opinion is a mere short-hand rendering of the facts, then opinion can be given subject to cross-examination as to the facts on which it is based." [Rearden v. Railroad, 215 Mo. 137, and many other cases cited in respondent's brief.] But defendant's counsel, upon cross-examination of Mrs. Parker, himself, proved the matter objected to, as follows: "Q. Mr. Parker was very devoted to you, and you had been devoted to him, and he to his children, and they to him? A. Yes." And defendant's witness, Anna Williamson, upon cross-examination, without objection, testified: "I was in the Parker home for about two years; saw Mr. Parker every day, he appeared to be in good health and always cheerful, and seemed very happy, and this continued as long as he lived; he never looked worried; Mrs. Parker used to speak of him being worried, but he didn't show it in his home, nor in his face; his eyes were always bright and cheerful; he was very kind to his children, and kind to everybody. "Q. What can you say of his home life, after two years of observation upon it, was it one of happiness or otherwise? A. Yes, sir, I think he was very happy, and I didn't see anything else. They were very kind people to work for, and Mr. Parker was certainly a kind man in his home, and very kind to his children, and he was always home, and when they went out they went out together."

So that, the testimony objected to in no way injured the cause of the defendant and no reversible error could in any event have been predicated upon its admission.

Finding no reversible error in the proceedings of the lower court, let the judgment be affirmed. It is so ordered. *Brown and Ragland, CC., concur.*

PER CURIAM:—The foregoing opinion by SMALL, C., is adopted as the opinion of the court. All of the judges concur.

PRISCILLA KILBURN, Administratrix, v. CHICAGO,
MILWAUKEE & ST. PAUL RAILWAY COM-
PANY, Appellant.

Division One, July 11, 1921.

1. **NEGLIGENCE: Using Crippled Locomotive Engine: Escaping Steam.** The evidence showed that the engineer was the superior officer of the fireman; that it was the general railroad practice that when an engine became crippled not to proceed with the train until another was obtained from the nearest terminal shop; that after the train was under way on a regular run, it was discovered that steam in large quantities was escaping from the front end of the low-pressure cylinder on the left (or fireman's) side; that this steam enveloped the cab, and the working place of the fireman between the cab and coal tender; that after the train had run about twenty miles and had stopped at a principal town, the engineer notified the dispatcher that the engine was crippled, but it does not appear that anything further was done towards getting another engine, although at a station thirteen miles away the company maintained terminal shops and a round-house for engines; that it was dangerous to passengers to operate such an engine, and dangerous to the engineer and fireman because escaping steam would prevent them from seeing ahead; and that the train proceeded on schedule time, and the fireman's clothes were thoroughly wet by the escaping steam. *Held*, that these facts tended to show negligence on the part of the defendant; and testimony on the part of the engineer that the engine could be safely run, that the steam did not wet him and that the fireman did not complain of being wet when they took off their working clothes at the end of the run, is of no value in a consideration of a demurrer to the evidence.
2. ———: ———: ———: **Proximate Cause of Pneumonia.** Evidence that the clothing of the fireman of a train was thoroughly wet on November 28th by the steam escaping from the engine; that he removed his overalls in the cab at the end of the run, put on dry outward clothing and went home, and his underwear was then so wet that by twisting it water ran out; that he began coughing on the 28th, and a deep-seated cold followed just after that date until the full development of pneumonia on December 6th, and that on December 13th he died from lobar pneumonia, and testi-

mony of physicians that pneumonia often develops eight or ten days after exposure, where there are prodromal symptoms, and their testimony connecting the exposure to the steam with the pneumonia which caused his death, are evidence from which the jury could find that the superinducing and proximate cause of the pneumonia and his subsequent death therefrom was the negligence of the railroad company in failing to provide a safe engine.

3. ———: **Patent Defect: Crippled Engine.** Whether steam escaping from a running engine and enveloping the cab was so patently dangerous to the fireman, obeying the directions of his superior, the engineer, that a reasonably prudent man would not undertake to work thereon, is a question for the jury, and not a matter of law for the court to determine.
4. ———: ———: **Assumption of Risk.** Where steam was escaping from a running engine and enveloping the cab, and the evidence conflicts as to the duties of the fireman, and the engineer testifies that the engine could have been safely operated, the fireman will not be held, as a matter of law, to have assumed the risk of further operation, after the danger was discovered, but assumption of risk, under such circumstances, is, at most, a question for the jury.
5. ———: **Federal Employers' Liability Act: Invoking Safety Appliance Act: Contributory Negligence.** A plaintiff who, by her petition, plants her action, for the recovery of damages for the killing of her husband while engaged in interstate commerce, upon the Federal Employers' Liability Act, is not precluded from the benefit of the several safety statutes, if they are called into play by the facts. Said act by express reference makes the safety statutes applicable under stated circumstances by providing that "no employee who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee;" and the Boiler Inspection Act is especially applicable where plaintiff's husband was a fireman and was injured by steam which escaped from the defective engine and enveloped the cab in which he was at work, for Section 2 thereof is made to "apply to and include the entire locomotive and tender and all parts and appurtenances thereof," and under such circumstances contributory negligence is not even a partial defense.
6. ———: ———: ———: **Assumption of Risks: Contributory Negligence: Instructions.** Section 2 of the Boiler Inspection Act made it "unlawful for any common carrier, its officers or agents," to use a locomotive in interstate commerce, unless such engine and

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all parts thereof were in proper condition and safe to operate in the service to which put, without unnecessary peril to life or limb, and this section is by express reference made applicable to an action based on the Federal Employers' Liability Act; and where the facts show that the piston rod on the left low-pressure cylinder of the locomotive engine was broken off and the front end of the left cylinder had burst, and from said opening steam escaped when the train was running fast, and enveloped the cab in which plaintiff's husband as fireman was at work, and that the use of said engine was negligently continued in the operation of the train after its defective condition became known to the engineer, who was the fireman's superior, and such defective condition and negligent act were the proximate cause of the fireman's death, the instructions to the jury, in an action by the fireman's widow planted on the Federal Employers' Liability Act, should eliminate the defenses of contributory negligence and assumption of risks.

7. ———: **Measure of Damages: Diminution by Contributory Negligence.** And where, under the Boiler Inspection Act and the facts, contributory negligence is eliminated from a case brought under the Federal Employers' Liability Act, an instruction on the measure of damages which excludes any diminution of damages on account of the alleged contributory negligence of the deceased fireman, is not erroneous.
8. ———: ———: **Conscious Physical Sufferings.** Since the amendment of 1910 to the Federal Employers' Liability Act, the plaintiff may recover for the conscious bodily sufferings of the deceased fireman after his exposure to danger and before his death.
9. **ARGUMENT TO JURY.** Where counsel for plaintiff in their argument to the jury went outside the record and made unduly inflammatory remarks, but the trial court, upon objection, directed the jury not to consider them, and the size of the verdict indicates that they were not influenced thereby, the judgment will not be reversed.
10. ———: **Reading From Medical Book.** Counsel for plaintiff, in cross-examining physicians offered as witnesses by defendant, used several medical books, and got one of the physicians to admit that a certain passage in one of them was correct doctrine and to say that he would adopt it as an expression of his own views, and this passage counsel for plaintiff, in his argument, was reading to the jury when the trial judge stopped him and told him he had no right to read from the book, as it had not been offered in evidence. *Held*, that the conduct of counsel was not reversible error.

Appeal from Clinton Circuit Court.—*Hon. A. D. Burnes,*
Judge.

AFFIRMED.

Fred S. Hudson for appellant.

(1) Instruction 1 is erroneous, because it does not properly declare the law. *Crecelius v. Ry.*, 274 Mo. 687; *Dowell v. Ry.*, 190 S. W. 939; *Ry. v. Earnest*, 229 U. S. 114. (2) Instruction 3 is erroneous, because the jury is told not to take into consideration the question of contributory negligence or the assumption of risk. *Seaboard Air Line v. Horton*, 233 U. S. 492. (3) Instruction 12 is erroneous, because it does not properly declare the rule relative to damages in a case of this character, and for the further reason that said instruction authorized a recovery for the physical pain and mental suffering of the deceased. *Crecelius v. Ry.*, 223 S. W. 418, pars. 8 and 9. (4) Remarks of counsel in the opening statement relative to the change of venue and also in comment of plaintiff's attorney as to the court's ruling in his argument to the jury, were inflammatory and prejudicial and an appeal to the prejudice and passion of the jury. *Neff v. City of Cameron*, 213 Mo. 350; *Beck v. Ry.*, 129 Mo. App. 7; *Level v. Ry.*, 196 Mo. 622; *Blyston-Spencer v. Ry.*, 152 Mo. App. 142; *Bishop v. Hunt*, 24 Mo. App. 377; *Terryson v. Ry.*, 129 S. W. 409; *Jackman v. Ry.*, 206 S. W. 244. (5) The verdict is the result of prejudice and passion and is founded on conjecture, speculation and guess and not upon the testimony in the case. *Harper v. Ry.*, 186 Mo. App. 308; *Lahnick v. Ry.*, 118 Mo. App. 611; *Chilty v. Ry.*, 148 Mo. 64. (6) The verdict is founded upon testimony that shows that it is just as possible and just as probable that deceased contracted pneumonia at some other time and some other place and in some other way than that charged in the petition. *Kelly v. Ry.*, 141

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Mo. App. 492; Warner v. Ry., 178 Mo. 125; Root v. Ry., 195 Mo. 348; Smart v. Kansas City, 91 Mo. App. 586. (7) The demurrer to the evidence should have been sustained. Authorities under Points 5 and 6. (8) It was error for plaintiff's attorney, during the temporary absence of the court from the bench, and during the closing argument, to read to the jury from a book which was not in evidence.

Platt Hubbell and *Geo. H. Hubbell* for respondent.

(1) Respondent's instructions numbered 1 and 3 properly declare the law under the Federal Employers Liability Act and the Federal Safety Appliance Act. 8 U. S. Comp. Stat. Ann. (1916), secs. 8631, 8639a. 8612, 8621, 8660, 8659; Moore v. Ry. Co., 268 Mo. 31, 243 U. S. 311, 61 L. Ed. 741; Thornton v. Railroad, 175 N. W. (Iowa) 71; Great No. Ry. Co. v. Donaldson, 246 U. S. 121; Union Pac. Railroad Co. v. Huxoll, 245 U. S. 535, 62 L. Ed. 455; Great No. Railroad Co. v. Otos, 239 U. S. 349; Texas & P. Railroad Co. v. Rigsby, 241 U. S. 33; Cent. Vt. Railroad Co. v. White, 238 U. S. 507, 59 L. Ed. 1433; Richey on Fed. Em. L. & Saf. App. Act, sec. 54, p. 133; Ry. Co. v. Wagner, 241 U. S. 476, 60 L. Ed. 1110; Grand Trunk Railroad v. Lindsay, 233 U. S. 42, 58 L. Ed. 838; Ann. Cas. 1914C, 168; Lancaster & Wight v. Allen, 207 S. W. 986; Salabrin v. Ann Arbor Ry. Co., 160 N. W. 552, 194 Mich. 458; Kippenbrock v. Wabash Ry. Co., 270 Mo. 479, 194 S. W. 50; Kerrigan v. Ry. Co., 90 N. W. 976, 86 Minn. 407; Ry. Co. v. Campbell, 241 U. S. 497, 60 L. Ed. 1037; L. & N. Ry. Co. v. Layton, 243 U. S. 617. (2) Respondent's instruction number 12 properly declares the law in this case. 8 Comp. Stat. Ann. (1916), sec. 8665, p. 9439; Ry. Co. v. Scala, 244 U. S. 630; Ry. Co. v. Craft, 237 U. S. 648, 59 L. Ed. 1160; Railroad Co. v. Leslie, 238 U. S. 559, 59 L. Ed. 1478; Calhoun v. Great No. Ry. Co., 156 N. W. (Wis.) 198; Chesapeake & Ohio Ry. Co. v. Carnahan, 241 U. S.

241; Fullerton v. Ferdyce, 144 Mo. 529; Doyle v. Ins. Co., 24 L. Ed. 151, 94 U. S. 535; Ry. Co. v. Barrett, 67 Fed. 218. (3) The partial and isolated excerpts from the remarks and argument of counsel are not error. Vawter v. Hultz, 112 Mo. 639; 2 Encyc. P. & P. 756, 757; Gibson v. Ry. Co., 131 N. W. 1057; Dean v. Wabash Ry. Co., 229 Mo. 455; Huckshold v. Ry. Co., 90 Mo. 558; Wendler v. Furn. Co., 165 Mo. 542; People v. Shears, 65 Pac. 295, 133 Cal. 154; State v. Frelinghuysen, 45 N. W. 432, 43 Minn. 265; Wright v. State, 38 S. W. (Tex. Civ. App.) 1004; Pennington v. State, 48 S. W. 507; State v. Court, 225 Mo. 616; Osterfag v. Railroad, 261 Mo. 479; Torreyson v. U. Rys. Co., 246 Mo. 706. (4) The defective cylinder and the wetting of the deceased by reason of the escaping steam therefrom on the trip from Liberty to Laredo was the cause of the pneumonia and the death of Kilburn. Hartzler v. Railroad, 140 Mo. App. 665; Beauchamp v. Min. Co., 15 N. W. 64, 50 Mich. 163, 45 Am. Rep. 30; Seckinger v. Mfg. Co., 129 Mo. 605; MacDonald v. Railroad, 219 Mo. 483; Kuenzel v. St. Louis, 278 Mo. 281; Hinkle v. Railroad Co., 199 S. W. 227; Bannister v. Jevne, 151 Pac. 546, 28 Cal. App. 123; Johnson v. Cont. Cas. Co., 122 Mo. App. 369; Bayne v. Storage Co., 148 N. W. 412, 5 C. C. A. 837; Hastings v. No. Pac. Ry. Co., 53 Fed. 224; 10 Am. Neg. Cas. 689; Nicholl v. Sweet, 144 N. W. 615, 163 Iowa, 683, Ann. Cas. 1916C, 661; Luisi v. Ry. Co., 136 N. W. 322; Murphy v. Railroad, 31 Nev. 120, 101 Pac. 322, 21 Ann. Cas. 502; 1 Thompson on Negligence, sec. 154; Ry. Co., v. Buck, 96 Ind. 346, 49 Am. Rep. 168; Hanlon v. Ry. Co., 104 Mo. 381; Ry. Co. v. Miller's Admx., 176 Ky. 701, 197 S. W. 403, 18 C. C. A. 825; Ball v. No. Pac. Ry. Co., 173 Pac. 1029; N. Y. Cent. Ry. Co. v. Gapinski, 249 Fed. 346; Tex. & P. Ry. Co. v. Howell, 56 L. Ed. 892, 224 U. S. 577; Maginnis v. Railroad, 268 Mo. 675. (5) It was not improper for respondent's counsel to use the medical book in his argument, as it was only used in connec-

tion with the discussion of the testimony of a witness who had adopted the extract as a part of his testimony. *Bradley v. City of Spickardsville*, 90 Mo. App. 424; *Hayes v. Cont. Cas. Co.*, 98 Mo. App. 410; *State v. Oakes*, 202 Mo. 105; *State v. Brandenburg*, 118 Mo. 187.

GRAVES, J.—Plaintiff is the widow and administratrix of Orley V. Kilburn, deceased. She sues under the Federal Employers' Liability Act of 1908, as amended in 1910. Orley V. Kilburn was in the employ of the defendant as fireman of engines. By his decease he left his wife and four minor children, who were dependent upon him. Defendant operated an interstate railroad, and deceased was running as fireman on an interstate train. His run on this train (a fast passenger train) was from Kansas City, Missouri, to Laredo, Missouri, *via* Liberty, Missouri. The negligence averred in the petition is as follows:

"After leaving Kansas City, and before arriving at Liberty, Missouri, the piston rod on the left low-pressure cylinder of the locomotive engine of said train was broken off and the front end of the left cylinder was bursted, allowing steam to escape from said cylinder.

"Instead of changing engines at Liberty, Missouri, and instead of procuring another engine, the defendant, acting through its officers, servants and agents, negligently required the deceased, Orley V. Kilburn, as such fireman, to continue to operate said locomotive engine and to serve as the fireman of the same all the way from Liberty, Missouri, to Laredo, Missouri; and the defendant then and there negligently failed to change engines at Liberty; and the defendant negligently failed to change engines between Liberty and Laredo, and the defendant then and there negligently failed to furnish a reasonably safe engine for the use of the deceased as such fireman between Liberty and Laredo; and the defendant then and there negligently failed to

so repair and remedy said defects in said engine, in such a manner as to prevent the escape of large quantities of steam from the left side and cylinder of said engine into the cab thereof; and the defendant then and there, and thereby, negligently required said Orley V. Kilburn to labor and work in a place which was not reasonably safe, and to operate a locomotive engine which was not reasonably safe.

"After the breaking of said piston rod, as aforesaid, said locomotive engine was not in reasonably proper condition, and was not reasonably safe to operate in the service and use to which the same was put; and said locomotive engine could not be so operated without unnecessary peril to life and limb.

"All the way from Liberty, Missouri, to Laredo, Missouri, on said trip and 'run,' large quantities of steam and vapor rolled out of said cylinder and rolled out of said left side of said locomotive engine and passed into the cab of said locomotive engine, whereby said Orley V. Kilburn was required to inhale and breathe said steam and vapor while at work, and whereby the clothing of the said Orley V. Kilburn became thoroughly saturated with said steam and vapor and became thoroughly wet, and whereby the body of the said Orley V. Kilburn became wet and chilled; and by reason of inhaling said steam and vapor, and by reason of his clothing and body becoming saturated and wet and chilled by said steam and vapor, and by reason of said negligence and negligent acts of the defendant, the said Orley V. Kilburn contracted pneumonia and became affected by the disease of pneumonia, as a result of which the said Orley V. Kilburn was totally disabled from doing any kind of labor on December 5th; and was confined to his bed on and after December 6, 1915; and as a result of which exposure to steam and vapor and said disease of pneumonia caused thereby, the said Orley V. Kilburn died at Laredo, Grundy County, Missouri, on December 13, 1915."

By the petition the date of these negligent acts are fixed as either of the date of November 28th or the date of December 2nd, of the year 1915. Damages were asked in the sum of \$60,000, and a verdict was obtained for \$15,000, upon which the judgment appealed from herein was entered.

By answer the defendant (1) admitted that it was a Wisconsin corporation doing business under the laws of Missouri, (2) admits that Kilburn was on November 28 1915, its fireman on the passenger train described in the petition, known as the Southwest Limited, (3) a plea of contributory negligence, (4) a plea of assumption of risk, and (5) a general denial. The record shows no reply, but the cause was tried as if one had been filed.

The assignment of errors cover several matters, all of which will be noted in the opinion, but the first of these is that the case should not have been submitted to the jury. Pertinent facts will follow under the points made in the course of the opinion.

I. The pertinent facts upon the demurrer may and should be grouped in three classes, (1) those bearing on the negligence of the defendant, (2) those bearing upon the proximate cause of the death of plaintiff's husband, and (3) those bearing upon the matters of contributory negligence and assumption of risk.

(1) It appears that deceased was the fireman on defendant's passenger train running from Kansas City, Missouri, to Chicago, Illinois. At 5:55 p. m. of November 28, 1915, this train left Kansas City for Chicago.

The run of deceased and his engineer ended at Laredo, Missouri, some eighty miles beyond Liberty, Missouri, another station on this line of railroad. At Coburg, a station out some five miles from the Union Station in Kansas City, the defendant had and maintained a round-house and machine-shops for its engines on this division of its road. The de-

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ceased and his engineer left the round-house at 4:30 of that evening, on a large compound engine, numbered 3500. The train left Kansas City at 5:55, but when a mile west of Liberty the piston rod on the lower cylinder on the left side of the engine broke, and a large portion of the front end of the cylinder was blown out. When steam was being used this permitted quantities of low-pressure steam to escape, and if the engine was running fast, this steam would envelop the cab, and working place of deceased between the cab and coal tender. There is conflict as to the amount of the escaping steam, and conflict as to how much would reach the working place of deceased. It is agreed that an engine in this condition required more water and coal, than if the engine had been in shape. The train stopped at Liberty. The plaintiff used as a witness the engineer, one Dider. This witness said:

“Q. You mean steam went out of the front end of the low-pressure cylinder? A. Yes, sir.

“Q. This steam, instead of going out the stack, went out the front end of the low-pressure cylinder? A. Yes, sir.

“Q. Just tell what you did at Liberty, when you arrived at Liberty. A. Well, we arrived at Liberty. I told the fireman, ‘We will get water here, and I will go back, and tell them that we broke the left low-pressure piston, and we would go along, and do the best we could’—told them we was ready to quit any time we got an engine to relieve us. We got along so well we practically made running time all the way along.”

In fact, with some seventeen minutes of unforeseen stops, the train reached Laredo just nineteen minutes late. Later on the engineer says that he told the operator at Liberty to tell the dispatcher that he had blown out the lower-pressure cylinder on the left side and that he would go on and do the best they could, and for the dispatcher to keep tab upon him. The engineer took out his train without hearing from the dispatcher, or

knowing that the Liberty operator actually sent the message. The train continued at a speed of forty miles per hour, or near that, and landed at Laredo without further incident, other than the escaping steam.

The evidence conflicts as to the duties of the fireman, knowing as he did the condition of his engine, before leaving Liberty. Plaintiff showed that the engineer was the boss of the engine crew and that his directions went. Defendant showed that a fireman could refuse to work and stop the train for a new engine to arrive. It does not appear that any thing further was done toward getting a new engine, either from the shops at Coburg, thirteen miles from Liberty, or at any place after leaving Liberty. These are the facts bearing upon defendant's alleged negligence.

(2) The deceased died on December 13th of lobar pneumonia. It is claimed that on this run from Liberty to Laredo (eighty miles) this escaping steam thoroughly drenched his clothes, which occasioned a deep-seated cold, which on December 6th forced him to quit his work by reason of an attack of lobar pneumonia. He worked continuously from November 28th until the morning of December 6th, when he had to give up his engine (a freight engine upon which he was the engineer) and he returned upon a passing passenger train to his home, where he arrived about noon and shortly thereafter called his family physician, who happened also to be the local doctor at Laredo for defendant.

The evidence for plaintiff tends to show that his clothes were very wet when he reached Laredo on November 28th; that he left his overalls and jumper in his engine and they were wet throughout; that he put on a drv suit in the cab of the engine and went home, but the wife says that his underwear was so wet that by twisting it the water would run out. The evidence further tends to show that he had this cold and coughing from just after the 28th until the full development of pneumonia on December 6th. As is usual the medical

experts and doctors differed as to the probability of the pneumonia having developed from the exposure on the 28th. According to some it could have and often did develop eight to ten days after an exposure, where there were prodromal symptoms, as here. The wife testified to the fact that the cold immediately followed the exposure, and that whilst her husband kept at work, he was languid and on the nights he was at home called for water during the night, and that she had to use applications on his chest. These and other details is the line of facts upon which is predicated proximate cause of death.

(3) The alleged negligence and assumption of risk grew out of what happened at Liberty as deceased and his engineer took out their train from that station.

II. (1) Was there negligence upon the part of the company or its engineer (for he was the *alter ego* in this instance) in running this engine on from Liberty to Laredo, in its then condition? Upon a demurrer to the evidence we need only consider the plaintiff's case from the evidence for the plaintiff. By an experienced engineer, used as an expert, the plaintiff showed that it was a general railroad practice when an engine was crippled as this one was shown to have been crippled, not to proceed from Liberty until a new engine was procured from the nearest terminal shop, which in this case was Coburg, some thirteen miles distance. By the same expert it was shown that it was dangerous both to the passengers, and to the engineer and fireman to operate such an engine—dangerous, because the escaping steam would prevent them from seeing ahead. The same witness, as well as many others, testify that as between the engineer and the fireman, the engineer is the superior officer. This evidence tends to show negligence upon the part of defendant, and it then becomes a matter for the jury to determine the conflict of the evidence, and there was a

Negligence
Proved.

conflict in this case. This conflict, however, was determined by the jury against the defendant. There was evidence tending to show that this engine should not have been further run in the condition in which it was in, when it reached Liberty. The engineer said it could be safely run, and he says that the steam did not wet him, nor did deceased complain to him of being wet when they took off their working clothes at Laredo. But this is of no benefit to us on a demurrer to the evidence. The evidence of the plaintiff made a case of negligence upon the part of defendant, in its failure to get a new engine at Liberty, and in running this crippled engine from Liberty to Laredo.

(2) The evidence of the doctors also connected the exposure to this steam with the pneumonia which produced death. From their evidence the jury could well find that this exposure was the superinducing and proximate cause of the pneumonia. Doctors for the **Proximate Cause.** defendant said that the exposure of the 28th was too far away from the actual development of the pneumonia, whilst doctors for plaintiff said that the exposure caused the conditions which later developed the pneumonia, and eight to ten days was frequently required in such cases. It became a question for the jury, under proper instructions.

(3) Under the expert testimony of plaintiff the engine was so defective as to endanger the fireman and engineer, as well as the traveling public. In this state the condition would have to be so patently dangerous, that a reasonably prudent man would not undertake to **Patent Danger.** work further thereon. Whether it was or not, was at least a question for the jury. We could not say as a matter of law that he was guilty of negligence in obeying the directions of his engineer. So that the demurrer was not well taken on this point.

So too we think the matter of assuming the risk was not so patent, as to declare it as a matter of law. The evidence conflicts even as to the duties of the fireman in

Assumption of Risk. such cases. The engineer himself thought, and testified that they could proceed with safety. Assumption of risk, like contributory negligence, was at most a question for the jury. We conclude that the demurrer was not well taken. What we have said, *supra*, is purely upon the matter of the demurrer to the evidence. Whether there could be either contributory negligence or assumption or risk we discuss later.

III. The further consideration of the case requires a consideration of the pleading of plaintiff. Her petition says:

"The plaintiff is prosecuting this action under the Federal Employer's Liability Act, an Act of Congress approved on April 22, 1908, as amended on April 5, 1910; and this action arises under said Act of Congress."

She has classified her action and is bound thereby. In her brief the Federal Safety Appliance Act and the Federal Boiler Inspection Act are mentioned, but they are not in this case, except as they may be brought in by the Federal Employers' Liability Act. By express terms she plants herself upon the Federal Employers' Liability Act, and the case stated and the trial thereof must be judged by it. So in the discussion of other alleged errors, we shall proceed upon the theory that this is an action under the Federal Employers' Liability Act, and not otherwise. Instructions given and refused must be measured by such act. The relevancy or irrelevancy of evidence must be measured by it. In fact the case must be tried under it. But this does not mean that for given purposes in the trial the Federal Safety Appliance Act and the Federal Boiler Inspection Act may not be considered. This because several sections of the Federal Employers' Liability Act refer to other acts, for given purposes. Thus in Section 3 of the act it is said:

"Provided, That no such employee who may be injured or killed shall be held to have been guilty of con-

tributory negligence in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee."

It is clear that the Federal Safety Appliance Act has nothing to do with the case, because the things thereby covered were not the things that went wrong in this case. See this act and all its amendments as Appendix G, 2 Roberts on Federal Liabilities of Carriers, p. 1593; 8 Federal Statutes, Ann. (2 Ed.) p. 1155 et seq. The only reference to a locomotive in this act is as to the brakes thereon and appliance to operate the train brake-system. Of those things no question is made in plaintiff's petition, nor is there a showing in the evidence. It is true that this act bars assumption of risk as a defense, and it might be available in this case did the facts fit the law.

When we reach the Boiler Inspection Act, 8 Fed. Statutes, Ann. (2 Ed.), p. 1200 et seq., we have more trouble. It is an act to promote the safety of both the employees and travelers upon railroads, and by the amendment of March 4, 1915 (effective 6 months thereafter), section two of the original act was made to "apply to and include the entire locomotive and tender and all parts and appurtenances thereof." [38 Stat. L. 1192.]

Section 3 of the Federal Employers' Liability Act, whilst recognizing that contributory negligence is a partial defense for some actions, yet it expressly precludes it as any kind of a defense in the proviso quoted, *supra*, where the injury was occasioned by the violation "of any statute enacted for the safety of employees." The Boiler Inspection Act was enacted for the safety of employees and is one of the statutes referred to in the Federal Employers' Liability Act. Section 4 of the last named act cuts out the defense of assumption of risk in the same class of cases, and this Section 4, mentioned, *supra*, makes it clear that those safety statutes should be considered in the trial of cases under the Federal Employ-

ers' Liability Act, because it speaks of actions brought under that act. In other words, the Federal Employers' Liability Act gives the cause of action, and by its terms draws the safety statutes, by whatever name, to it, in the determination of the matters of contributory negligence and assumption of risk. So while plaintiff planted her rights under the Federal Employers' Liability Act she is not precluded from the benefit of the several safety statutes, if they are called into play by the facts. This because the act under which she sues by express reference makes the safety statutes applicable under stated circumstances.

IV. We reach now the complaints of the appellant. It complains of instructions 1 and 3, because by them the defenses of contributory negligence and assumption of risk are eliminated. Section 2 of the Boiler Inspection Act as amended by the Act of March 4, 1915, made it "unlawful for any common carrier, its *officers or agents*," to use an engine or locomotive in interstate commerce unless such engine and all parts thereof were in *proper condition* and safe to operate in the service to which it was put, without unnecessary peril to life or limb. [8 Fed. Statutes, Ann. (2 Ed.), p. 1201, et seq.] The first instruction was predicated upon this statute, and reads:

"The court instructs the jury that, in moving interstate traffic or interstate commerce, the defendant railway company, acting through its officers, servants and agents, owed to Orley V. Kilburn a duty to exercise ordinary and reasonable care and caution to use, and to provide for his use, a locomotive engine having all its parts in a reasonably proper condition and reasonably safe to operate in the service and use to which the same was put, and which locomotive engine might be so used without unnecessary peril to life and limb.

"A failure to perform this duty, if you believe from the evidence that there was such failure, is negligence as a matter of law.

"And if the jury believe from the evidence that on or about November 28, 1915, deceased, Orley V. Kilburn, was in the employ of the defendant railway company, and was serving as fireman for defendant on a passenger train known as the 'Southwest Limited,' numbered 26; and that said train had started and was on its way from Kansas City, Missouri, to Chicago, Illinois, for the purpose of carrying passengers from Kansas City to Chicago, and to intermediate places; and that then and there deceased Kilburn was on his trip or run from Kansas City to Laredo; and that deceased Kilburn and the defendant were then and there engaged in interstate commerce, as defined in these instructions; and that shortly before arriving at Liberty the lower and low-pressure piston rod broke, and that the front end of the low-pressure cylinder was broken out, on the left-hand side of said engine; and that by running said engine in said broken condition, large, unusual and unreasonable quantities of steam were caused to escape from said cylinder into the left side of the cab and into the gangway between the engine and tender; and if the jury further believe from the evidence that then and there said locomotive engine was not in reasonably proper condition and was not reasonably safe to operate from Liberty to Laredo; and that said locomotive engine could not be so operated without unnecessary peril to life and limb; and if the jury further believe from the evidence that ordinary and reasonable care required that defendant railway company, acting through its officers and engineer in charge of said engine and train, provide and furnish another and different engine to haul said train to Laredo; and if the jury further believe from the evidence that the defendant railway company, acting through and by its engineer, negligently ran said locomotive engine from Liberty to Laredo with

steam from the lower cylinder on the left-hand side passing into said cab and gangway; and if the *jury believe from the evidence that such acts of said engineer were negligent acts, as defined in these instructions*; and if the jury further believe from the evidence that Fireman Kilburn and his clothing were thereby caused to become wet and saturated with said steam and that he became chilled thereby; and that as a result of said wetting, saturation and chilling Fireman Kilburn was therefore caused to contract pneumonia; and if the jury further believe from the evidence that the death of Fireman Kilburn resulted in whole or in part from negligence, if any, of the defendant, as above mentioned, and from such wetting, saturation, chilling and pneumonia, then the plaintiff is entitled to recover, and your verdict must be in favor of the plaintiff."

The third instruction is predicated upon the first, and reads:

"If the jury believe from the evidence that on or about November 28, 1915, the deceased, Orley V. Kilburn, was in the employ of the defendant railway company, and was serving as fireman for defendant on a passenger train known as the 'Southwest Limited,' numbered 26; and that the deceased Kilburn and the defendant railway company were engaged in interstate commerce, as defined in these instructions; and if the jury further believe from the evidence that, in the way and manner described and stated in the plaintiff's preceding instruction numbered 1, the said Orley V. Kilburn was negligently caused to become wet, and his clothing saturated with steam, as described and stated in the plaintiff's preceding instruction numbered 1; and that, as a result of so becoming wet, and as a result of said saturation of his clothing, said Fireman Kilburn was thereby caused to contract pneumonia; and if the jury further believe from the evidence that the death of said Fireman Kilburn resulted in whole or in part from negligence of the defendant, if any, as mentioned

in the plaintiff's preceding instruction numbered 1, then, under the laws of the Government of the United States, there is no assumption of risk or contributory negligence in this case, and the verdict must be for the plaintiff."

If, as we have held, the Boiler Inspection Act, so far as the matters of contributory negligence and assumption of risk are concerned, is drawn into the Employers' Liability Act, by the references to safety laws therein, then these instructions, excluding these two defenses, are proper, if the facts of the case bring it within that safety law. This Boiler Act, as amended in 1915, prohibits a locomotive, disabled in any of its parts, to be used in interstate commerce, if such use might occasion peril to life or limb. It is true there is no showing that this engine and all its parts were not in proper condition when it started upon the interstate journey, but the statute does not limit the duty as to condition to the time of starting. It prohibits the use of an engine out of condition in interstate commerce, and it can make no difference when that unfit condition arises. And this prohibition is not only against the carrier, but also against "its officers and agents." The engineer with this engine at Liberty, Missouri, was at least an agent in charge of this engine, if in fact he was not the *alter ego* of the carrier. Under these laws and the facts shown the instructions are well enough. If the engine at Liberty, within thirteen miles of another engine, was not such as should have been used in interstate commerce, under the safety law, *supra* (the Boiler Inspection Act), then the defenses of contributory negligence and assumption of risk are out of the case.

The use of the disabled engine from Liberty to Laredo was a matter which might have been averted by the engineer, the agent of defendant. To say the least, if by its condition (and concededly it was not in proper condition) there was unnecessary peril to either life or limb, it was a violation of the law to use it, and these

two instructions properly submit the facts, and properly declare the law.

If the statute did not bar the doctrine of assumption of risk in this case, the plaintiff, under the Federal rule as to assumption of risk, might be in close straits for a case. [*Seaboard Air Line v. Horton*, 233 U. S. l. c. 507 et seq.]

Nor do we think that our views conflict with *Norfolk & Western Ry. v. Earnest*, 229 U. S. 114, cited by appellant. The case made in this appeal with which we are dealing falls within the proviso of Section 3, and the terms of Section 4 of the Employers' Liability Act, as above stated, but in the *Earnest* case the opinion, at page 120, says that the proviso of Section 3 was not involved in that case, and the facts of the case so show. In our case it is this proviso of Section 3 and Section 4 of the act, which, when taken with the safety laws, cuts off the defenses of contributory negligence and assumption of risk.

V. Going to the assignment of errors (which always limit the matters for determination here) we find that Instruction 12 is urged as being erroneous. This

is the instruction on the measure of damages. Measure of Damages. It is first contended that it is erroneous, in

that it omits to include the diminution of damages by reason of alleged contributory negligence upon the part of the deceased. This contention has been fully answered in the paragraph above. There could be no contributory negligence in the case.

Next it is suggested that it errs in permitting the plaintiff to recover for the conscious bodily sufferings of the deceased after his exposure and before his death. The petition asks for such damages, and since the amendment of the Employers' Liability Act of 1910, the United States Supreme Court has ruled that such damages may be recovered. [*St. Louis & Iron Mountain Ry. Co. v. Craft*, 237 U. S. 648; *K. C. So. Ry. Co. v. Leslie*, 238 U. S. 599.]

Since the amendment of 1910, the rulings have been that, if the deceased lingered along for a time before death, and suffered conscious pain, he in his life-time had a right of action for such, and this right of action, by the amendment, was transmitted to the administrator, and was a different right from the pecuniary loss suffered by the dependents. The cases, *supra*, hold, however, that the damages for both can and should be recovered in the one action. These rulings, and the views we have above expressed on contributory negligence and assumption of risk, answer all the objections to Instruction number 12.

It should be said that the Federal cases rule that where death is instantaneous, or when there is no conscious pain suffered before death, no damages are allowable under the transmitted cause of action. Appellant cites us to our case of *Crecelius v. Railway*, 223 S. W. (Mo.) 1. c. 418. What is there said should be read in the light of the facts. That was a case of instant death, and we announced the Federal rule in such class of cases. If there was a showing of conscious pain between the commission of the tort and the death, as here, then the rule announced in the *Craft* and *Leslie* cases, *supra*, applies.

VI. There are but two other matters here that call for notice. Appellant contends that counsel for plaintiff made improper and prejudicial arguments before the jury. It is true that such counsel did, at times, go beyond the record in the course of their remarks, and made reference to things that should not have been mentioned in the course of legitimate arguments, but upon objection, in such cases, the trial court stopped counsel in such remarks, and several times directed the jury not to consider such arguments. If the verdict had been largely excessive, it might call for a closer scrutiny of some of this argument, but the size of the verdict does not indicate that defendant suf-

Argument
to Jury.

ferred from an unduly influenced jury, although the argument in places was inflammatory. It really appears from the size of the verdict that the jury was not inflamed by the argument, but followed the admonitions of the learned trial judge to ignore such arguments. The trial court cured the trouble promptly, where it could be cured, and what impressions that might have been left do not seem to have hurt the defendant. We do not condone the method of the arguments made in the case, but do not believe that the record, on this matter, when taken as a whole shows reversible error. Had the verdict been largely excessive we might have had a more serious question on this subject.

Another contention is that counsel for plaintiff, in his closing argument, read from a medical book. It appears that the trial court left his seat for a few moments, and this was done in his absence. The judge returned as defendant's counsel were objecting and promptly stopped plaintiff's counsel, telling him that he had no right to read from the books, as they had not been introduced in evidence. The further facts show that counsel for plaintiff in the course of cross-examining the doctors for defendant had used several medical works, and in cross-examining Dr. Morrow, a witness for the defense, got him to admit that a certain question from one of those books was correct doctrine and to say that he would adopt such expression as his own views on the subject. It was this excerpt that counsel had read when the court admonished him to read no further. The facts all considered we do not feel that the verdict should be disturbed for this conduct of counsel.

Finding no substantial or prejudicial error in the trial of the case, the judgment is affirmed. All concur.

H. S. COLES et al. v. ANNA BELFORD et al., Appellants.

Division One, July 11, 1921.

1. **CONVEYANCE: Testamentary Deed.** After the owner of land had signed and acknowledged a deed of gift in Illinois, conveying to her nieces her home in Springfield, Missouri, she handed it to one of them, saying, "You take this and put it in your box and keep it and whenever anything happens you send it to Springfield and have it recorded," the words "whenever anything happens" being further elucidated by the witness as being understood by him to mean "when she died." *Held*, that, although by this delivery the maker may be said to have parted with dominion over the deed, her intention was that it should take effect upon her death; it was therefore testamentary in character, and did not pass a present interest in the property to the grantees.
2. ———: ———: **Delivery: Intent.** In order to constitute a valid delivery the handing of a deed by the maker to one of the grantees must be done with the intent of passing an estate *in praesenti*, and if the giving of the deed into the hands of the grantee is not done with the intent of passing the title at the time there is no delivery in contemplation of law.
3. ———: ———: **Retaining Possession.** Retention of the management and control of property after a deed of gift conveying it to nieces is signed, acknowledged and handed to one of them, paying taxes and making improvements upon it, receiving the rents and placing it in the hands of an agent to be sold, by the grantor, are evidence that it was not her intention that the deed should take effect and pass title as a present transfer.
4. ———: ———: ———: **Self-Serving Evidence.** In a suit by heirs of the maker against the grantees to set aside a deed of gift, letters written by the grantor, after she had signed and acknowledged it, to a real estate agent, her banker and attorney, relating to the payment of taxes upon the property, the making of repairs and the sale thereof, are not merely self-serving statements, but competent cumulative evidence consistent with the oral testimony of the addressees who detail facts showing her continued exercise of control over the property and her intention that the deed was not to become effective until her death. Besides, the grantees, having admitted in their answer that the grantor con-

tinued to control the property after the execution of the deed, cannot be heard to complain of such letters.

5. ———: ———: **Decree on Another Ground.** The decree of the trial chancellor cancelling and annulling a deed being correct will be upheld on appeal, although he reached that conclusion on the ground that the deed "was not executed and delivered," and the Supreme Court are of the opinion it was testamentary in character and therefore void.

Appeal from Greene Circuit Court.—*Hon. Guy D. Kirby,*
Judge.

AFFIRMED.

J. O. Patterson, A. E. Butters and Patterson & Page for appellants.

(1) A deed, regular on its face, with acknowledgment formally correct, found in possession of the grantee, is prima-facie valid, and the burden is upon plaintiffs to show its invalidity. R. S. 1909, sec. 2818; *Bohan v. Casey*, 5 Mo. App. 101; *Harvey v. Long*, 260 Mo. 374; *Elliott v. Sheppard*, 179 Mo. 382. (2) Before a deed prima-facie valid can be declared invalid, the evidence of its invalidity should be clear, satisfactory, and convincing, and there should be a decided preponderance in favor of its invalidity. *Barrett v. Davis*, 104 Mo. 549. (3) The recitals of the deed, together with the testimony of the notary public who took the acknowledgment, show a sufficient delivery. *Harvey v. Long*, 260 Mo. 374; *Cook v. Newby*, 213 Mo. 471; *Miles v. Robertson*, 258 Mo. 717; *Standiford v. Standiford*, 97 Mo. 231; *Fenton v. Fenton*, 261 Mo. 202; *Potter v. Barringer*, 236 Ill. 224. (4) The admission of the diary of Mrs. Wilson was error, and the letters of Mrs. Phelps after date of deed tending to show acts of ownership, though admitted without objection, have no probative force, being in the nature of self-serving statements. *Elliott v. Sheppard*, 179 Mo. 382; *O'Day v. Realty Company*, 191 S. W. 41; *Townsend v. Schaden*, 275 Mo. 227.

Coles v. Belford.

M. C. Smith, R. Magoon Barnes, Jay H. Magoon, Kirk Hawkins, and Wallace J. Black for respondents.

(1) The evidence shows there was no sufficient delivery of the deed in question to divest Carrie S. Phelps of the title and vest the same in Anna and Mary Belford. *Miller v. Lullman*, 81 Mo. 316; *Tyler v. Hall*, 106 Mo. 313; *Hall v. Hall*, 107 Mo. 101; *Tobin v. Bass*, 85 Mo. 654; *Staniford v. Staniford*, 97 Mo. 231; *Sneather v. Sneather*, 104 Mo. 201. (2) Mrs. Wilson's diary was competent evidence. *Elliott v. Sheppard*, 179 Mo. 582. (3) Where the evidence is contradictory and conflicting, this court has repeatedly deferred to the decision of the lower court. *Jones v. Thomas*, 218 Mo. 540; *Brecker v. Fillingham*, 209 Mo. 583; *Huffman v. Huffman*, 217 Mo. 182. When the question of delivery arises between a grantor and a grantee, it is to be determined by a preponderance of evidence. 1 Devlin on Real Estate (3 Ed.), sec. 263b, p. 393.

ELDER, J.—This is a suit in equity to set aside a deed executed by Carrie S. Phelps, now deceased, conveying certain real estate located in the City of Springfield, Missouri.

Plaintiffs H. S. Coles and B. F. Shafer are nephews of Mrs. Phelps, and plaintiff Marie Porterfield is a niece. Defendants Anna Belford, Mary Belford and George F. Belford are nieces and nephew, respectively of Mrs. Phelps, and the remaining defendants are her collateral heirs at law.

Mrs. Phelps had a sister, Mrs. Belford, the mother of defendants Anna, Mary and George F. Belford, and a brother, Frank D. Shafer, both of whom lived near Lacon, Illinois. In November, 1909, the sister died, and Mrs. Phelps, who then resided in Springfield, went to attend the funeral. After the funeral she lived with defendants Anna and Mary Belford off and on for about two and one-half years, when she built a log cabin on the

farm of her brother, near his house, and resided there up until the time of her death.

The deed in controversy is a special warranty deed, dated January 17, 1910, conveying to defendants Anna Belford and Mary Belford a house and lot in Springfield, valued at \$10,000, which for a long time prior to November, 1909, had been occupied by Mrs. Phelps as a home. The deed purports to have been acknowledged in Marshall County, Illinois, on January 17, 1910, before defendant George F. Belford, a notary public and brother of the grantees, the acknowledgment reciting that the grantor acknowledged "that she signed, sealed and delivered the said instrument as her free and voluntary act." The recited consideration is \$1000, but it is conceded that the same was not paid. The instrument contains a release and waiver of the right of homestead, and warrants the promises as against all persons, claiming by, through or under the grantor. On cross-examination, over objection by counsel for plaintiffs, E. N. Ferguson, banker and advisor of Mrs. Phelps in business matters, and a witness for plaintiffs, testified that the signature to the deed was that of Mrs. Phelps.

The testimony of defendant George F. Belford relative to the execution and delivery of the deed was to the effect that on Saturday, January 15, 1910, he was requested to come to the home of his sisters, Anna and Mary Belford, near Lacon, Illinois, where Mrs. Phelps was then living; that "Mrs. Phelps desired I should come down there and make a deed for her;" that when he arrived both of his sisters and Mrs. Phelps were there, and he had some talk with Mrs. Phelps about the matter of making the deed; that on the following Monday, January 17th, the deed was written by witnesses, Anna and Mary Belford and Mrs. Phelps being present at the time; that Mrs. Phelps "had another old deed of the property, she read one and I read the other one, she told me what to put in;" that "I had Aunt Carrie, Mrs.

Phelps, to sign it, and then she acknowledged it; first before that I read it over to her."

"Q. Now after the deed was acknowledged by her as you have stated, what did she do with it, if anything?

A. She gave it to Anna Belford and said to put it in her box.

"Q. Whose box? Anna Belford's box; she says, 'You take this and put it in your box and keep it and whenever anything happens you send it to Springfield, Missouri, and have it recorded.'

"Q. Which one of your sisters took the paper? A. Anna, I think.—

"BY THE COURT: She told your sister to take the deed and put it in her box? A. Yes, sir, and keep it and whenever anything happened to her, when she died, to send it to Springfield, Missouri, and have it recorded.

"Q. Did she sign that deed in your presence? A. Yes, sir.

"Q. And delivered it to Anna Belford in your presence? A. They was sitting down by the table and she signed the deed right there; she handed the deed to me and I wrote the acknowledgment, and I handed it back to her and she handed it to Anna Belford.

"Q. I will ask you to state to the court what her mental and physical condition was at that time, whether it was good or otherwise? A. She was in pretty good mental condition at that time, and understood everything she was doing.

"Q. What was done there in the drafting of the deed was done at her direction? A. Yes, sir, everything that was done there was done under her direction.

"Q. How old was she at that time? A. She was seventy-five or seventy-six.—

"Q. There was no consideration paid for this deed? A. I didn't see any paid for it.

"Q. Why did you put in the deed an alleged consideration of \$1000? A. Aunt Carrie told me to put it

in there; I says, 'What will I put in here?' and she said, 'Put in \$1000.'

"Q. Did she understand it was a gift? A. That is what I understood it.

"Q. Did she tell you why she wanted to make the deed? A. She said she wanted to give the property to the girls, wanted them to have it."

There was no other evidence bearing upon the execution and delivery of the deed.

There was testimony for plaintiffs that on January 3, 1910, Mrs. Phelps, accompanied by plaintiff Marie Porterfield, returned to Springfield, Missouri, where they both remained until the latter part of February, 1910, and that while there Mrs. Phelps had some improvements made on the property conveyed by the deed in controversy, such as having bathroom fixtures installed and sewer connections made. There was testimony for defendants that Mrs. Phelps did not make this trip until March 1, 1910, and that during the entire months of January and February, 1910, she was at the Belford girls' home near Lacon, Illinois.

Carrie S. Phelps died January 14, 1917. At that time defendant Anna Belford had possession of the deed in suit, and sent it to Springfield, where it was filed for record in the office of the Recorder of Deeds for Greene County on January 18, 1917.

The foregoing for the present sufficiently outlines the facts in the case. Other matters which may be pertinent to the appeal will be referred to in the course of the opinion.

The petition alleges that Carrie S. Phelps was the owner of the property in question and had occupied the same for many years; that after her removal to Illinois she had received the rents therefrom, paid taxes and insurance thereon and made extensive repairs thereto; that there had been filed for record a deed "purporting to have been executed on the 17th day of January, 1910, by said Carrie S. Phelps, conveying said described lands to

defendants Anna Belford and Mary Belford;" that "said pretended deed was acknowledged before one George F. Belford." Proceeding, the petition further alleges as follows:

"Plaintiffs further allege that said notary public, George F. Belford, being related to said Anna Belford and Mary Belford, grantees in said alleged deed, unlawfully combined, confederated and conspired with them, the said alleged grantees, to procure and did obtain said fraudulent conveyance and deed for the unlawful purpose of procuring the title to said described lands without paying any consideration therefor, and in truth and fact no consideration whatever was paid to said Carrie S. Phelps or to anyone for her, and by fraud and false representations made to her by said defendants, Anna Belford, Mary Belford and George F. Belford, when her mind was in such condition that she did not comprehend the nature of the act, said Carrie S. Phelps being an aged woman at the time of the consummation of the transaction, or that said alleged deed was not executed, made or acknowledged by said Carrie S. Phelps, nor delivered to Anna Belford and Mary Belford, or either of them, nor to any person for said Anna Belford and Mary Belford, and that said deed is not in fact the deed of Carrie S. Phelps.

"The plaintiffs further say that at the date of said alleged deed and the date of the purported acknowledgment thereof before George F. Belford, said notary public, said Carrie S. Phelps was not in the State of Illinois.

"The plaintiffs do not know which of the alternative statements is true but believe and allege the former statement to be true, yet they are in ignorance whether it be the one or the other.

"The plaintiff further says that all of the afore-said acts and things committed by defendants, Anna Belford, Mary Belford and George F. Belford were done by them with the intention and design to cheat, wrong and defraud these plaintiffs and other heirs of said

Carrie S. Phelps and obtain all of said real estate for their own use without any consideration therefor."

The answer admits that Mrs. Phelps occupied the premises as her residence until her removal to Illinois; admits the subsequent receipt by her of the rents therefrom and the payment by her of taxes and insurance, and the making of repairs thereto; admits the acknowledgment and recording of "a warranty deed executed on the 17th day of January, 1910, by Carrie S. Phelps," but denies each and every other allegation of the petition. The answer further avers that "the aforesaid warranty deed was voluntarily made, executed and delivered by the said Carrie S. Phelps to the said Anna Belford and Mary Belford as a gift, she, the said Carrie S. Phelps, reserving verbally a life estate to herself therein."

The reply denies the execution and delivery of the deed, denies that it was made as a gift, and denies that Mrs. Phelps verbally reserved a life estate.

The trial court found that the deed "was not executed and delivered by said Carrie S. Phelps to defendants Anna Belford and Mary Belford, or either of them, nor to any person for said Anna Belford and Mary Belford," and entered a decree cancelling and annulling the same, divesting defendants Anna and Mary Belford of all title to the lands claimed by virtue thereof, and vesting title and ownership of said lands in plaintiffs and defendants, as heirs of Carrie S. Phelps. From this judgment and decree defendants have appealed.

I. Defendants assign as error that, "The finding and decree is against the evidence, against the weight of the evidence, and against the law under the evidence." The evidence wholly fails to show any mental incapacity of Mrs. Phelps as charged in the petition, nor

Testamentary
Deed.

was any particular effort made to prove such charge. On the contrary, the testimony tended to show that she was fully capable of transacting business. And that point not

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being urged in the briefs, we shall eliminate it from consideration. And, the record disclosing no evidence of any character tending to prove the averment contained in defendants' answer that Mrs. Phelps verbally reserved a life estate in the property, we shall also exclude that question from attention. Defendants urge, however, that the deed is prima-facie valid, that before it can be declared invalid the evidence of its invalidity should be clear and convincing, and that the evidence for plaintiffs falls short of that.

The record, comprising 250 pages, sets forth the testimony of some 26 witnesses for plaintiff and of 12 for defendants. The examination of all of said witnesses, with a few exceptions, was confined to establishing whether on January 17, 1910 (the date of execution of the deed in controversy), Mrs. Phelps was at Springfield, Missouri, or at the home of the Belford girls near Lacon, Illinois; plaintiffs zealously contending that on that day she was at Springfield and therefore could not have executed the deed as alleged, and defendants as strenuously insisting that at that time she was at the Belford home, near Lacon, in Marshall County, Illinois. Plaintiffs do not directly attack the genuineness of Mrs. Phelps's signature to the deed, but only do so indirectly by endeavoring to show that she was not at the Belford home when it was said to have been executed. The deed, which was introduced in evidence, appears regular on its face, with formal acknowledgment, and, from the testimony of plaintiffs' witness Ferguson, which was not rebutted, it appears that the signature thereto was that of Mrs. Phelps. However, from the view we take of the case, the mass of testimony taken on both sides to prove the whereabouts of Mrs. Phelps at the time the deed purports to have been executed, is besides the real question involved, which is, was there a sufficient delivery of the deed to divest Carrie S. Phelps of title and to vest the same in Anna and Mary Belford? Bearing upon the question of delivery we find only the statement

of defendant George F. Belford that Mrs. Phelps gave the deed to Anna Belford, saying, "You take this and put it in your box and keep it and whenever anything happens you send it to Springfield, Missouri, and have it recorded." True, by this delivery it may be said that Mrs. Phelps parted with dominion over the deed. However, when she said "*whenever anything happens* you send it to Springfield, Missouri, and have it recorded," that language indicates that it was her intention that the deed was not to become operative until her death. This interpretation is borne out by the further testimony of the witness George Belford, when, in response to an interrogation by the court, "She told your sister to take the deed and put it in her box?" he replied, "Yes, sir, and keep it and whenever anything happened to her, *when she died*, to send it to Springfield, Missouri, and have it recorded." Accordingly, upon authority of the adjudicated cases, the instrument was testamentary in character, did not pass a present interest in the property to the grantees, and hence was not good as a deed, notwithstanding the intention of Mrs. Phelps that it should take effect at her death. [Huey v. Huey, 65 Mo. 689; Terry v. Glover, 235 Mo. 544; Griffin v. McIntosh, 176 Mo. 392; Murphy v. Gabbert, 166 Mo. 596; Givens v. Ott, 222 Mo. l. c. 411; Scott v. Scott, 95 Mo. 300.] Under these authorities even a valid delivery within the life time of the grantor is not shown. This evidence fails to show that the handing of the deed to one of the grantees was done with the intent of passing an estate *in praesenti*, and intent is a material matter on the question of delivery. If the grantor did not give the deed to the grantee with intent of passing title at that time, then there was no delivery within contemplation of law.

As further indicative of the fact that it was not the intention of Mrs. Phelps that the deed should take effect and pass title as a present transfer, the record discloses that after the date of execution of the deed she continued, through agents, up until the time of her death, to re-

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tain the management and control of the property conveyed, even endeavoring to find a purchaser therefor. As to this, E. N. Ferguson, banker, of Springfield, testified that Mrs. Phelps did her banking business with the banks with which he was associated; that after January 17, 1910, he received letters from her "in regard to what I considered the property worth and the advisability of putting it on the market; I went down and looked at the property and made up my mind what I thought it was worth, and I advised her if it was my property I would sell it for that price, whatever that was; I looked around and I think I inquired of several real estate men if it was possible to sell it for the price, but I never was able to get a purchaser." Witness identified letters written to him by Mrs. Phelps relating to the payment of taxes on the property, the relaying of a walk and the widening of an alley adjacent thereto. Mr. M. C. Smith, attorney, of Springfield, testified that he had been Mrs. Phelps's personal counsel from 1905 until the time of her death; that she had possession and control of the property "all the time up to her death;" that in 1913 he represented her in connection with proceedings instituted for the widening of an alley adjoining the property; that in 1913 he had a new roof placed on the building, and had the barn and fence repaired; that in 1914 or 1915 he renewed an insurance policy on the building, the renewal being written in Mrs. Phelps's name. Witness identified several letters written to him by Mrs. Phelps, relating to repairs to the property. James W. McGregor testified that he occupied the property for six or seven years from some time in 1910, renting the same from Mrs. Phelps and paying the rent to Mr. Ferguson of the Holland Bank and the State Savings Bank. Moreover, in their answer defendants admit that after about March, 1910, "the said Carrie S. Phelps rented the said property, received the rents therefor, paid the taxes thereon, and that she procured and maintained policies of insurance payable to herself thereon

and that she made such repairs to the buildings as from time to time were necessary, and that she exercised general control of said lands."

Hence, the evidence and pleadings clearly showing that there was not such a delivery of the deed as to pass a present interest in the property conveyed, we disallow defendants' claim of error.

II. Defendants' remaining contention is that "the court erred in admitting incompetent, irrelevant, immaterial and prejudicial evidence on the part of plaintiffs, over the objection and exception of defendants."

One portion of the admitted evidence complained of was a diary kept by Mrs. Margaret Wilson, of Springfield, a witness for plaintiffs, containing an entry: "Jan. 21-1910. Was rather a misty day. Took birthday dinner with Mrs. Phelps; Marie was there; also Mr. John Kelly was there. We had a nice turkey dinner." Defendants argue that the diary, not being kept in chronological order, was inadmissible. In view of our ruling that the question of the sufficiency of delivery of the deed from Mrs. Phelps is determinative of the issues presented, it is unnecessary for us to pass upon the admissibility of this evidence for the reason that the same only went to establish the whereabouts of Mrs. Phelps on the 21st day of January, 1910, which is a secondary inquiry.

Other evidence excepted to was the letters written by Mrs. Phelps to E. N. Ferguson and M. C. Smith, respectively, relating to taxes and repairs on the property in question and the prospective sale thereof. Defendants

urge that these are but self-serving statements, made after the execution of the deed, and have no probative force. To this we cannot lend acquiescence. The continued exercise of general control over the property, as evidenced by these letters, is entirely consistent with the theory that it was the intention of Mrs. Phelps that the deed was not

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to become effective until her death. They are cumulative towards proving that theory and were properly admitted. Furthermore, defendants having admitted in their answer that Mrs. Phelps continued to control the property after the execution of the deed, they cannot be heard to complain of evidence to the same purpose and effect.

III. A reference to the finding of the trial court shows that it found that the deed "was not *executed* and delivered by said Carrie S. Phelps to defendants Anna Belford and Mary Belford, or either of them." While

Execution. there was substantial evidence upon which to base the finding that the deed was not executed, we are nevertheless refraining from passing upon that point, as the larger question presented is that of delivery of the deed. Holding, as we do, that the instrument was testamentary in character, and hence not good as a deed, it is unnecessary to expressly rule upon the matter of execution.

A careful review of the entire record convinces us, however, that the decree of the learned chancellor *nisi*, cancelling and annulling the deed, was correct. The judgment is accordingly affirmed. All concur.

ALICE BYRNE, Appellant, v. JOHN T. BYRNE et al.

Division One, July 11, 1921.

1. **WILL: Annulment: Rights of Legatees.** When a will is finally set aside by the judgment of the Supreme Court, all rights of the legatees under the will cease, and their rights to the property devised by it must be determined as if the testator had died intestate, except as to such prima-facie rights as they acquired by the formal probate of the will in the first instance in the probate court.

2. ———: ———: **Unassigned Widow's Dower: Quarantine.** Upon the annulment of the will of a householder, his widow, to whom dower was never assigned, was entitled, as her quarantine, to the possession of the mansion house and the messuages thereto belonging during her life, and to all rents and profits thereof, as if no will had existed. And where the home place consisted of 210 acres, of which ninety acres was devised to a son and the balance to the widow for life, the widow, upon the annulment of the will, was entitled to the possession of said ninety acres, as well as to the balance of the homestead, and during her life, no dower having been assigned, none of the testator's heirs had any legal claim to the rents or profits thereof.
3. ———: ———: ———: ———: **Will Obtained By Widow's Undue Influence.** Although the appellate court sustained the verdict of the jury setting aside the will on the ground that it was the result of undue influence exercised by the widow upon the testator, she cannot be deprived of her dower and quarantine in the home place, for when the will was annulled the result was that the testator died without a will and intestate, and his heirs and widow were restored to their rights at law, and among the rights regained by the widow was her right to dower and quarantine.
4. **EQUITABLE PARTITION: Improvements Made by Cotenant: Limitations.** An allowance to one tenant in common of the value of improvements made by him upon land brought into equitable partition is to be based upon the conditional and reciprocal right of the other cotenants, is not recognized at law at all but only in equity, and is governed wholly by equitable considerations, among them the maxim that he who seeks equity must do equity. The cotenant out of possession, who has received no benefit of the common estate, is entitled to offset or credit the rental value of his interest against the allowance for improvements made and taxes paid by the cotenant in possession, especially where the latter has received the rents and profits to the exclusion of his cotenants; and neither the claim for improvements nor the claim for rent is barred by the Statute of Limitations, nor does the question of limitations enter into the adjustment.
5. ———: ———: ———: **Excess of Rents.** Rents barred by the statute in an ejectment suit can only be used as a shield and not as a sword in chancery partition; only an equal amount of rental value can be allowed a cotenant out of possession against an allowance for improvements made by a cotenant in possession, and not the excess of rents over the value of the improvements.
6. ———: **Improvements Made Pending Will Contest.** In an equitable partition, the devisee named in a will, annulled after being pro-

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bated, should be allowed for improvements made by him in good faith pending the will contest.

7. ———: **Cotenant Out of Possession: Rents Claimable: Improvements.** In equitable partition the cotenant out of possession is entitled to only the rental value of his interest in the land as the land would have been without improvements made thereon in good faith by the cotenant in possession.
8. ———: ———: **Interest on Rents Claimable: Demand.** Where no wrong is committed in acquiring or retaining money a demand therefor is necessary in order that interest may be charged thereon, and interest can be collected only from the date of the demand. The judgment of the probate court admitting a will to probate is binding upon all the world until set aside by a suit to contest the will; and where such suit was instituted by a cotenant out of possession against a devisee of land named in the will and the will was set aside, but no demand for rents and profits was made in her petition, and she at no time pending that suit applied for a receiver or administrator *pendente lite*, or otherwise made a demand for her share of the rents, she is not entitled to interest on the rental value of her proportionate share of the land prior to the time she instituted her suit for equitable partition, but only from the date such partition suit was instituted.
9. ———: **Personal Property: After Final Settlement.** Where the will, duly probated, is set aside in a contest proceeding, the personal property distributed among the legatees in accordance with the direction of the will and the orders of the probate court, should be brought into hotchpot in an equitable partition, and each heir given his proportionate share thereof, as if there had been no will, and the amounts distributed to the favored legatees should be considered as advancements, which means that no interest is to be charged thereon. But where the testator's widow has died, the amount of money distributed to her, in accordance with the will, at and prior to the final settlement in the probate court, should not be brought into hotchpot.
10. ———: ———: **Effect of Final Settlement.** A final settlement made in the probate court in accordance with the directions of a will, duly probated, does not, when the will is annulled in a contest proceeding, bar an inquiry into the rights of the cotenants, in an equitable partition, to the personal property distributed in accordance with such final settlement; for it was made subject to be set aside and annulled in case of a successful contest of the will, and the will being set aside the amount of money, shown by said final settlement to have been distributed to the legatees, must be brought

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into hotchpot, as advancements to them, and distributed among the heirs as if the testator had died intestate.

11. ———: **Waste: Homestead.** In the equitable partition no allowance should be made against a cotenant who cut and sold cedar timber from the homestead, in which the widow had quarantine and no assignment of dower had been made therein, the evidence showing that she received the money for which the timber was sold and that the cotenant simply acted as her agent in cutting and selling it.
12. ———: **Taxes.** While cotenants who took possession of estate lands devised to them by their father's will, subsequently annulled in a contest proceeding, should, in an equitable partition, be charged with rents during the time they were in possession and up to the time of the partition sale, if they continue in possession up to said sale, they should be credited with any taxes they have paid or may pay prior to such sale.

Appeal from Ste. Genevieve Circuit Court.—*Hon. Peter H. Huck*, Judge.

REVERSED AND REMANDED (*in part*); AFFIRMED (*in part*).

John S. Marsalek, P. H. Cullen and Albert Miller
for appellant.

(1) The pendency of the suit to contest the will of Patrick Byrne, Sr., was and is sufficient to prevent the running of the Statute of Limitations against the claim of his grandchild, Alice Byrne. *Tapley v. McPike*, 50 Mo. 592; *Johnson v. Brewn*, 210 S. W. 55; *Jourden v. Meier*, 31 Mo. 44; R. S. 1919, sec. 2005; *Spratt v. Lawson*, 176 Mo. 182; *Snell v. Harrison*, 131 Mo. 503; *Hall v. French*, 165 Mo. 442; *Norton v. Reed*, 253 Mo. 236, 161 S. W. 842; *Estes v. Nell*, 140 Mo. 639; *De Both v. Coal Min. Co.*, 141 Mo. 497; *Sanford v. Herron*, 161 Mo. 176, 84 Am. St. 703; 2 Wood on Limitations (4 Ed.), sec 253; 17 R. C. L. sec. 228; *Hutchinson v. Hutchinson*, 92 Kan. 518, 141 Pac. 589, 52 L. R. A. (N. S.) 1165 and

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note; Harvey v. Pflug, 37 La. Ann. 904; 25 Cyc. 1278; Backus v. Burke, 65 N. W. 459; Snouffer v. City of Tipton, 142 N. W. 97; Klumpp v. Thomas, 162 Fed. 853, 89 C. C. A. 543; King v. Pomeroy, 121 Fed. 287, 58 C. C. A. 209; Harrison v. Scott, 77 Kan. 637, 95 Pac. 1045; Walterscheid v. Bowdish, 77 Kan. 665, 96 Pac. 56; Stefins v. Gurney, 61 Kan. 292, 59 Pac. 725; City of Hutchinson v. Hutchinson, 92 Kan. 518, 141 Pac. 589; St. Paul Ry. Co. v. Olson, 87 Minn. 117, 91 N. W. 294, 94 Am. St. 693; Downer v. Union Land Co., 103 Minn. 392, 115 N. W. 207. (2) In partition proceedings the court has jurisdiction and authority to take an accounting of rents accrued and debts due the estate of the ancestor, and may consider any defense, whether legal or equitable. Rozier v. Griffith, 31 Mo. 171; Budde v. Rebenack, 137 Mo. 179; Chamber v. Waples, 193 Mo. 96; Green v. Walker, 99 Mo. 68. (3) Where a co-tenant has been ousted and his right to the possession of the premises denied, the ousting co-tenants are liable for the rents and profits. Gage v. Gage, 28 L. R. A. 832, note; Schuster v. Schuster, 29 L. R. A. (N. S.) 228, note; Doerner v. Doerner, 161 Mo. 407; Goodenow v. Ewer, 16 Cal. 461; Scantlin v. Allison, 32 Kan. 376; Bowles v. Bowles, 80 Ky. 529; Real Estate Savings Inst. v. Collonious, 63 Mo. 290; Holloway v. Holloway, 97 Mo. 640; Coberly v. Coberly, 189 Mo. 2; 38 Cyc. 63, 66; Bates v. Hamilton, 144 Mo. 1, 13; Sears v. Sallow, 28 Iowa, 501; 17 Am. & Eng. Enc. Law (2 Ed.), 694; Starks v. Kirchgraber, 134 Mo. App. 214; 7 R. C. L. 828; 18 Ann. Cases, 1086, note; Tyler v. Cartwright, 40 Mo. App. 384; Childs v. Railroad, 117 Mo. 435; 1 C. J. 625; Hack v. Norris, 46 Mich. 587, 10 N. W. 104; Roosevelt v. Post, 1 Edw. (N. Y.) 579; Dormer v. Fortescue, 3 Atk. 124, 26 Reprint, 875; Doane v. Wade, 1 Ch. Rep. 48, 21 Reprint, 504; Hicks v. Sallitt, 3 De G. M. & G. 782, 52 Eng. Ch. 609, 43 Reprint, 307; Blackwood v. Gregg, Hayes & J. 310; Bolton v. Doane, Pree. Ch. 516, 24 Reprint, 231. (4) In such cases the co-tenant so taking possession of the entire property must

answer for the value of the use and occupation, regardless of the actual income received. 18 Ann. Cases, 1086, note; 7 R. C. L. 828; 7 R. C. L. 835; *White v. Stuart*, 76 Va. 546, 567; L. R. A. 1918-B, 607, note; *Dunbar v. Dunbar*, 163 S. W. 1159; *Brown v. Brown*, 209 Mass. 388, 395; *Adams v. Bristol*, 111 N. Y. S. 231; *Phoenix Land Co. v. Exall*, 159 S. W. (Tex. Civ. App.) 474. (5) In a partition proceeding the court is authorized to take into account any property which the other joint owners received from the co-ancestor, whether this property is real or personal, and to charge the party so receiving it with its full value. *Ayres v. King*, 168 Mo. 244; *Traders Bank v. Dennis Estate*, 221 S. W. 796; *Trabue v. Henderson*, 180 Mo. 616; *Wright v. Green*, 239 Mo. 449; *Wilson v. Charmel*, 102 Kan. 793, 1 A. L. R. 987, and note, pp. 991 to 1047; *Boothe v. Cheek*, 253 Mo. 131; *State ex rel. v. Guinotte*, 156 Mo. 519; *Hughes v. Burriss*, 85 Mo. 660; *Carson v. Suggetts*, 34 Mo. 365; *Warren v. Ry. Conductors of America*, 199 Mo. App. 209. (6) Interest is allowed on rents found due from one co-tenant to another, where the withholding is wrongful, as where the tenant holds adversely. *Bates v. Hamilton*, 144 Mo. 1; *Schuster v. Schuster*, 29 L. R. A. (N. S.) 233, note; *Gage v. Gage*, 28 L. R. A. 853, note; 38 Cyc. 71; *Real Estate Inst. v. Collonious*, 63 Mo. 290; *Johnson v. Pelot*, 24 S. C. 254, 58 Am. Rep. 253; 1 Story, Eq. Jur. sec. 655; *Thurston v. Dickinson*, 2 Rich. Eq. 317, 46 Am. Dec. 56; *Dellet v. Whitner*, Chev. Eq. 223; *Hancock v. Day*, McMull Eq. 69, 36 Am. Dec. 293; *Hall v. Boatwright*, 58 S. C. 544; *Carson v. Broady*, 56 Nebr. 648; *Jefferson City Savings Assn. v. Morrison*, 48 Mo. 274; 22 Syc. 1551; 1 Sutherland on Damages (4 Ed.), sec. 352; *Early v. Friend*, 16 Gratt, 21, 78 Am. Dec. 664; *Lowndes v. City Nat. Bank*, 82 Conn. 8, 22 L. R. A. (N. S.) 408; *Jones v. Williams*, 2 Call. 85; *Dow v. Adams*, 5 Munf. 21; *Nuckit v. Lawrence*, 5 Rand, 571; *Currier v. Kretzinger*, 162 Ill. 511, 58 Ill. App. 288; *Leete v. Pacific M. & M. Co.*, 89 Fed. 480; *Starks v. Kirchgrab-*

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er, 134 Mo. App. 216; Tarleton v. Goldthwaite's Heirs, 58 Am. Dec. (Ala.) 302; Whitworth v. Hart, 22 Ala. 343; Van Ormer v. Harley, 102 Iowa, 150, 71 N. W. 241; Myers v. Bolton, 157 N. Y. 393; Armijo v. Neher, 11 N. M. 645, 72 Pac. 12; Sieger v. Sieger, 209 Pa. 65; Watts v. Watts, 104 Va. 269. (7) A co-tenant cannot recover for improvements made on the common property when not made in good faith, or while the title to the property was in litigation. Turner v. Edmonston, 210 Mo. 413; Buford v. Packet Co., 3 Mo. App. 159; Bailey v. Wenn, 113 Mo. 155; Dodd v. Lee, 57 Mo. App. 167. (8) To permit the sons of Patrick Byrne to allege that their mother held the home place under quarantine rights of a widow is to permit them to assume inconsistent positions with reference to the same subject-matter heretofore litigated, and they are debarred and estopped from so doing. Lilly v. Menke, 143 Mo. 144; Lilly v. Menke, 126 Mo. 190; Catholic Church v. Tobbein, 82 Mo. 418; Lilly v. Tobbein, 103 Mo. 477; McClanahan v. West, 100 Mo. 322; Benseick v. Cook, 110 Mo. 182; Mining Co. v. Casualty Co., 161 Mo. App. 200; State v. Baker, 262 Mo. 698; St. Louis v. United Rys. 263 Mo. 427; Bigelow on Estoppel (5 Ed.), 673, 717; Brown v. Bowen, 90 Mo. 184; Smiley v. Cockrell, 92 Mo. 105; Knoop v. Kelsey, 102 Mo. 291; Tower v. Moore, 52 Mo. 118; Chouteau v. Gibson, 76 Mo. 38; McGuire v. Nugent, 103 Mo. 161; Hill's Admr. v. Huckabee's Admr., 70 Ala. 183; Railroad v. Howard, 13 How. (U. S.) 337; Caldwell v. Smith, 77 Ala. 157; 10 R. C. L. sec. 20, p. 691, sec. 26, p. 698, sec. 29, p. 702; Scanlon v. Walshe, 81 Md. 118; Norfolk Ry. Co. v. Turnpike Co., 111 Va. 131, Ann. Cas. 1912A, 239; R. S. 1909, sec. 360; 9 R. C. L. sec. 43, p. 601. (9) After the lapse of ten years, the widow's right to dower is forever barred, and she may waive her dower rights orally. R. S. 1909, sec. 391; Casteel v. Potter, 176 Mo. 76; R. S. 1909, secs. 114, 115; Johns v. Fenton, 88 Mo. 64; 14 Cyc. 774; Lenfers v. Henke, 73 Ill. 405, 24 Am. Dec. 268; Pearce v. Pearce, 184 Ill. 289; Sill v. Sill, 185 Ill. 594.

Clyde Williams and John H. Reppy for respondents.

(1) Tenant in common who makes improvements upon premises and pays taxes is entitled to compensation. 30 Cyc. 233; *Armor v. Frey*, 253 Mo. 447; *Gunn v. Thurston*, 130 Mo. 344; *Holloway v. Holloway*, 97 Mo. 639; *Green v. Walker*, 99 Mo. 72; *Grogan v. Grogan*, 177 S. W. 649. (2) The measure of the allowance is the increased value of premises by reason of the improvements. *Armor v. Frey*, 253 Mo. 477. (3) Rents and profits cannot be increased by reason of improvements placed on premises by the tenant. 30 Cyc. 234; *Worthington v. Hiss*, 16 Atl. (Md.) 534; *Johnson v. Pelot*, 24 S. C. 255; *Rice v. Freeland*, 12 Cush. (Mass.) 170; 22 Cyc. 6; *Armor v. Frey*, 253 Mo. 479. (4) Action for an accounting for rents and profits received barred in five years. *Stark v. Kirchgraber*, 134 Mo. App. 218, 180 Mo. 633; *Names v. Names*, 67 N. W. (Neb.) 754; *Sommers v. Bennett*, 69 S. E. (W. Va.) 696; *Lilly v. Menke*, 126 Mo. 190. (5) Widow may occupy and use the home farm or plantation without being liable to pay rent for same and this right continues until dower is assigned. *Gentry v. Gentry*, 122 Mo. 202; *Phillips v. Presson*, 172 Mo. 27; *Carey v. West*, 176 Mo. 178; *Melton v. Fitch*, 125 Mo. 290; *Givens v. Ott*, 222 Mo. 420; *Roberts v. Nelson*, 86 Mo. 21; *Osborn v. Weldon*, 146 Mo. 185; *Reed v. Lowe*, 163 Mo. 519; *Thomas v. Black*, 113 Mo. 66; *Barris v. Emmons*, 139 N. E. (Mich.) 872; Sec. 334, R. S. 1919; *Powell v. Bowen*, 279 Mo. 293; *Graham v. Stafford*, 171 Mo. 692. (6) The order of the probate court approving the final settlement of the estate of Patrick Byrne is a judgment which remains in full force and effect until set aside by proper proceeding, and an action for that purpose cannot be brought now because barred by the Statutes of Limitations. *Van Bibber v. Julian*, 81 Mo. 627; *Smith v. Hauger*, 150 Mo. 437; *Patterson v. Booth*, 103 Mo. 417; *State ex rel. v. Carroll*, 101 Mo. App. 113. (7) Interest cannot be allowed on

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rents and profits of bequests. Sec. 7179, R. S. 1909; Coombes v. Knowlson, 193 Mo. App. 560; Ry. Co. v. Knapp-Stout & Co., 160 Mo. 417; Nelson v. Hirsch & Sons Co., 102 Mo. App. 516; Nelson v. Wynan, 21 Mo. 352; Ray v. Loper, 65 Mo. 470; Ladd v. Stephens, 147 Mo. 319.

SMALL, C.—Suit in partition in equity. Appeal from the Circuit Court of Ste. Genevieve County, to which the case was taken by change of venue from Jefferson County, where the land was located. The land belonged to Patrick Byrne, Sr., at the time of his death. He died on July 5, 1891, leaving a purported will which was admitted to probate August 8, 1891.

The respondents are the children, and the appellant, Alice Byrne, the granddaughter, the only child of his deceased son Thomas, and the parties constitute the only heirs of said Patrick Byrne, Sr. The deceased also left a widow, Rose Byrne. The appellant, Alice, was but 18 months old when her grandfather died, and on August 8, 1908, within the statutory period after her majority, brought suit to set aside her grandfather's will, making the respondents and the widow parties defendant in said will contest. There were three trials and three appeals to this court, the case being twice reversed and remanded (1st Appeal, 250 Mo. 632; 2nd Appeal, 181 S. W. 391); and the third appeal was affirmed on July 5, 1918, twenty-seven years after the death of the testator and ten years after the suit to contest the will was commenced (3rd Appeal, 204 S. W. 730).

On the day of the final affirmance by this court, the respondents, as plaintiffs, commenced a suit against the appellant to partition all of the land in question, except one tract, and on August 19, 1918, the appellant Alice Byrne, as plaintiff, filed a suit against the respondents to partition said one tract. The suits were consolidated and tried as one cause. There is no dispute in the plead-

ings between any of the parties as to the ownership of each as an heir of said Patrick Byrne, Sr., being an undivided one-eighth interest in all the land sought to be partitioned. There is no contest in the pleadings between the respondents themselves, but they all ask that they each have one-eighth interest in the land or its proceeds upon sale in partition, subject to the claims of John T., James and Patrick Byrne, for improvements and taxes.

But appellant, Alice Byrne, in her pleadings takes issue with any claim of said respondents for improvements and taxes, and asks for rents and profits on her share and interest thereon and waste committed and all relief she seeks in this appeal, including an allowance in this proceeding for her share of the personal estate left by her grandfather, which her co-tenants received under the will set aside.

The widow died on the 24th of March, 1914, and her dower was never assigned in any of the land in question.

At the time of the grandfather's death, the said lands consisted of the home place, having about two hundred and ten or two hundred and fifteen acres in cultivation, ninety acres of which he devised by his will to respondent, John T. Byrne. The evidence shows that the ninety acres devised to John T. Byrne, and the balance of the home place, which was devised to the widow for life, were occupied by the widow and her children, until her death in March, 1914.

Besides the home place, there was a tract of 160 acres separated therefrom, which by the will of the deceased was devised to Patrick Byrne, respondent.

Also another tract, devised by said will to James Byrne, respondent, on which there was an old mill and mill-site, at the time of the death of said Patrick Byrne, Sr. This tract contained 139 acres of land.

After his mother's death, respondent John T. Byrne collected the rents from the home place, amounting in all to \$6,735 for the years 1914 to 1918, both inclusive.

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And during that period he also paid taxes to the amount of \$250, and made improvements of the value of \$500, and which increased the value of the land that sum. The lower court charged him with the total rents received after his mother's death without interest thereon, and allowed him for the taxes and improvements above mentioned. It charged neither the said John T. Byrne, nor any of the respondents, with any rents or profits of the said home place, including said ninety acres willed to said John T. Byrne, during the lifetime of the mother, holding that she was entitled to possession under her right of quarantine, her dower never having been assigned. There was also evidence that in 1910 said John T. Byrne, who seemed to be the manager for some years of the farm for his mother, sold \$1,650 worth of cedar timber off the home place, but the appellant's witness, who purchased it, said that, while it was good timber when he brought it, it soon would have been destroyed by insects, which infested it, had it not been cut down and removed. Furthermore, John T. Byrne testified that he personally got no benefit from the transaction, that he acted for his mother, who received the money. The lower court denied any claim against him on this item.

As to the 160 acres, or respondent Patrick Byrne's farm. He occupied it himself for fifteen years, and rented it to tenants the remainder of the time after his father's death. The evidence tended to show that he made improvements and betterments upon the land, increasing its value from \$1,800 to \$3,000 in the year 1895. We think about \$2,250 would be a fair allowance to him for improvements, and that its rental value was doubled by these improvements. From the evidence of both parties, the rental value of the land, without the improvements, from the date of the father's death until the trial, would not be unfairly estimated as averaging \$100 per annum. The total taxes he paid on the farm during the entire time was \$482.

As to the 139 acres with the mill and mill-site, devised to James Byrne. He was in possession from the

time of his father's death. At the time, the mill was dilapidated and the mill-dam was out of repair. It was not fit for operation until November, 1894. He gives a detailed statement of the improvements he made with his money and labor by which he practically rebuilt the mill. He also enlarged the dwelling house and remodeled other buildings on the place; bored a well; put concrete walks and fences around the dwelling house; and cleared off eight acres of land. These improvements increased the value of the land about \$6,000. His testimony was corroborated by apparently disinterested witnesses. During the entire period, he paid taxes amounting to \$992. We find from the evidence that the rental value of the 139 acres, independent of the mill and other improvements, was about \$150 per annum on an average for the entire time. He rented the mill at two different times, collecting \$600 from one renter and \$400 from the other. Some of the improvements were made on the mill in the fall or spring after the third verdict against the will, but before the final judgment of affirmance in this court, which was on July 5, 1918.

The lower court refused to charge either of the parties with the rents except for the five years preceding the institution of the suit, on the ground that they were barred by the Statute of Limitations. There were also certain legacies received by five of the cotenants under the will of said Patrick Byrne, Sr., which the lower court refused to require them to account for in this proceeding. We shall refer to this personal property, and such other details, as may be necessary in the opinion. The said Alice Byrne alone appealed to this court.

I. We think there is no doubt that after the will was finally set aside by the judgment of this court on the 5th day of July, 1918, all rights of the parties under the will ceased, and their rights must be determined as if the testator died intestate, except as to such prima-facie rights as they acquired by the formal probate of the will in the first instance in the pro-

Rights of
Legatees.

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bate court. [Hines v. Hines, 243 Mo. l. c. 500; McIlwrath v. Hollander, 73 Mo. 105; Boothe v. Cheek, 253 Mo. 132-3.]

Therefore upon the annulment of the will the widow's dower, never having been assigned to her, she was entitled to the possession of the mansion house and the messuages thereto belonging during her life and to all the rents and profits thereof, as if no will had ever existed.

Rights of Widow. And it appearing from the facts as found by the lower court and as found by us, that the ninety acres of the home place, devised to John T. Byrne by the will, belonged to and was connected with the home place or mansion house of the deceased, his widow was entitled to the possession of said ninety acres, as well as the remaining portion of the homestead land. Consequently, neither the appellant, Alice Byrne, the granddaughter, nor any of the other children or heirs of the deceased, had any legal claim to the rents and profits of the home place, including said ninety acres, during the life time of the widow. That was her quarantine. [Gentry v. Gentry, 122 Mo. 202; Phillips v. Presson, 172 Mo. l. c. 27; Melton v. Fitch, 125 Mo. l. c. 290; Givens v. Ott, 222 Mo. l. c. 420; Roberts v. Nelson, 86 Mo. 21; and other authorities cited by respondents.]

The lower court correctly ruled on this point.

II. We have not overlooked the earnest insistence of appellant's learned counsel, that in the contest proceeding the jury found the will was the result of the undue influence of the widow and John T. Byrne, and that, therefore, the widow should not have quarantine after

Will Result of Widow's Undue Influence. the will was set aside, because the existence of the will prevented the plaintiff from having dower assigned to the widow during her lifetime, and to allow her quarantine would be to permit her to profit by her own wrong. We cannot agree to this contention.

This court twice reversed and remanded the contest proceeding, and on the third appeal the verdict setting aside the will was affirmed simply on the ground that

there was evidence of undue influence. [204 S. W. 730.] But "it was an exceedingly close case." [181 S. W. 393-4.] However, the contest proceeding was not a proceeding *inter partes*, as in ordinary cases, but a proceeding *in rem* (Bradford v. Blossom, 207 Mo. 228), and the verdict therein is, therefore, no evidence in this case as to the will having been procured by the undue influence of the widow. There is, therefore, no evidence of wrong-doing on the part of any one in the making of said will in the record before it. But, admitting the will was procured by the undue influence of the widow, the position of learned counsel is wholly untenable. By the verdict and judgment in the contest proceeding it was conclusively established that the testator died without any will, and all his heirs and his widow were restored to their rights at law. The proponents, as well as the contestants of the will, were restored. While the proponents lost their rights under the will, they gained their rights under the law, as did the contestant, and among the rights regained by the widow was her right to dower and quarantine. The proposition that she lost both her rights under the will and her rights under the law, too, by the setting aside of the will, is wholly untenable. [Hines v. Hines, 243 Mo. 500, and other cases cited supra.]

III. But we think the learned court below committed error in not allowing the appellant rents and profits on her share, prior to, as well as during the five-year period next before, the commencement of the partition suit, and holding that her claim thereto was barred by the five-year Statute of Limitations. The right to allow one tenant in common the value of his improvements or betterments is a conditional or reciprocal right. The value of such improvements is not allowable at all at law, but only in equity. It is wholly governed by equitable considerations. The first maxim of equity is, that he who seeks equity must do equity. Accordingly, we find it is well settled that the cotenant out of possession, who has received no benefit of the common estate, is entitled to

offset or credit the rental value of his interest, as against the allowance made the cotenant, who has been in exclusive possession and enjoyment of the estate, for the improvements made and taxes paid thereon. That the Statute of Limitations bars neither the claim for improvements nor the claim for rent; it does not enter into the equation on either side. Especially is this so in cases like the one at bar, where the tenant in possession, although not in adverse possession, has received and held the rents and profits of the common estate to the exclusion of his cotenant. [Cain v. Cain, 53 S. C. 350; Vaughan v. Langford, 81 S. C. 282; note to 16 Am. Dec. 443; 7 R. C. L. sec. 39, p. 843; 20 R. C. L., p. 734; Coberly v. Coberly, 189 Mo. 1, L. R. A. 1915 C, 207, note; Bates v. Hamilton, 144 Mo. 1; Snell v. Harrison, 131 Mo. 495; Holloway v. Holloway, 97 Mo. 628.]

IV. It is true, that in none of the Missouri cases above cited, or which we have been able to find, has the court had under consideration or decided, that the rents prior to the five-year period barred by the statute (Sec. 2394, R. S. 1909) from recovery in suits between cotenants, as well as strangers, in ejectment (Starks v. Kirchgraber, 134 Mo. App. 218), can be allowed in equitable suits in partition, but all our decisions are in harmony with the general principles of equity as to charges and countercharges between cotenants in such equitable proceedings. It is also true, that in Hines v. Hines, 243 Mo. 500, a case deciding several of the controverted points in this case, the court disallowed the claim for rents which the lower court had charged against one of the occupying cotenants, and cited said Section 2394 as authority therefor (bottom of page 500). But the real ground of the decision was upon the equitable principle of "reciprocity." The court said (page 500): "Owing to the fact that none of the other parties who have received and held property under the will of Matilda A. Higgins (which had been set aside in a suit to contest it) have been charged with

**Allowance in
Ejectment.**

rents or interest, we find it would be inequitable to charge defendant Thomas Wesley Hines with rent on the real estate in Missouri, which he received and held until the will contest was instituted." In that case, however, there was no claim for improvements, which distinguishes it from the case at bar. We rule, and only intend to rule, that rents or profits, prior to the statutory period of five years, which are barred by said Section 2394 in proceedings in ejectment, can only be used in equitable proceedings in partition as an offset against a claim for improvements and taxes paid, and not that the balance, if any, of such rents, over the value of such improvements, could be recovered or charged against the occupying cotenant. In other words, such rents so barred by the statute in ejectment suits can only be used as a shield and not as a sword in chancery suits in partition.

V. Nor do we concur in the contention that improvements made pending the proceedings to contest the will should not be considered as made in good faith, and for that reason no allowance should be made on account thereof. All the improvements in this case were made after the *ex parte* or formal probate of the will in the probate court. This vested title *prima-facie* in the devisees, who afterwards made the improvements which benefited the property to the amount allowed therefor. The law permitted the institution of suits to contest said will during a period of many years after it was probated. In the meantime, however, the devisees were entitled *prima-facie* to the possession and use of the property purported to be devised to them by said will. If the property could not be improved in good faith by such devisees, especially when they are also heirs, pending such contests or right to contest a will—which might endure twenty-seven years, as in this case—and be allowed compensation therefor, in case the will was set aside, the property might be of little value to anyone during such period and be greatly depreciated when the contest was finally determined and thus work a great injustice and

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hardship to all the owners thereof. This is inequitable. We rule this point against appellant.

VI. But it has been ruled, and it is the law, that the co-tenant out of possession is only entitled to the rental value of his interest in the land, as the land would have been without *improvements* made by the cotenant in possession. [Armor v. Frey, 253 Mo. l. c. 477-8; 30 Cyc. 234; 7 R. C. L. note 13, sec. 38, p. 843.]

Rents Less
Improved
Value.

VII. In view of the foregoing principles, we hold, as to the 139 acres, or James Byrne farm, that he is chargeable only with the rental value of the farm independent of the mill and without the other improvements he made on said farm, which, under the evidence, we find would average \$150 per annum, or \$4,000 in round numbers, for the 27 years after his father's death up to the time of the trial, and at the same rate per annum since that time. That he should be allowed \$7,000 for all his improvements and taxes paid by him up to the time of the trial, leaving a balance of \$3,000 due him against such tract of 139 acres, on account of such improvements and taxes.

In the same manner, Patrick Byrne should account for \$2,700, total rental value, without improvements, of the 160 acres occupied by him for the entire period from his father's death to the trial of this partition suit, and that he should be allowed \$2,700 for his improvements made and taxes paid during that time. So that one charge offsets the other, and his account, as to said 160 acres, is balanced.

We find correct and affirm the accounting as to John T. Byrne, made and required by the lower court in its decree.

What we have said in this paragraph, refers only to the real estate, and not to the personal property left by the deceased, Patrick Byrne, Sr., which we shall notice presently.

VIII. In the foregoing accounting, we have allowed no interest on rents and profits, which learned counsel for appellant earnestly claim should be allowed. In this case, the occupying cotenants were not trustees *Interest.* *ex maleficio*, nor did they wrongfully appropriate to their own use the money of the other cotenants.

It is well settled that where no wrong is committed in acquiring or detaining the money, a demand is necessary to charge the party with interest and its computation will begin from such demand. [15 R. C. L. sec. 25. p. 29, and many cases cited.]

The judgment of the probate court admitting a will to probate is valid and binding on all the world until set aside by a suit to contest the will under the statute. [Dilworth v. Rice, 48 Mo. 131-2; Banks v. Banks. 65 Mo. 432; Stowe v. Stowe, 140 Mo. 594.]

But the probate of the will is set aside and its efficacy is destroyed upon the filing of the suit to contest the will. [Johnson v. Brewn, 210 S. W. 55; State ex rel. v. Imel, 243 Mo. l. c. 186.] So that prior to the institution of the suit to contest the will, the devisees occupied the property and collected and retained the rents under a prima-facie right to do so, subject to account in case the will was subsequently contested and set aside. This did not render them liable to pay interest thereon during such period. Neither at the time the suit to contest was filed, nor at any time before or afterwards, did plaintiff demand her share of the rents and profits. Nor upon the filing of her suit to contest did she apply for a receiver or administrator *pendente lite*, as authorized by statute. [Sec. 21, R. S. 1909.] But she acquiesced in the occupying cotenants continuing to collect the rents and profits, the same as they did before, subject to the outcome of the suit to contest the will. This was not a mere inadvertence on her part. She had able legal advice. The case was "an exceedingly close case," as held by this Court. It

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was well enough to permit her claim for rent to rest and abide the result of the will contest, as was done. Plaintiff having thus consented to the occupying cotenants collecting and retaining the rent during the contest, they neither wrongfully received nor wrongfully retained the same during that time, and are not chargeable with interest thereon.

It is true, that in *Bates v. Hamilton*, 144 Mo. 1, interest on rents collected by one cotenant was allowed to the others, but in that case there was a present right to the rents when collected in each cotenant, and, in effect, a demand therefor and wrongful refusal to pay over, which is the distinguishing feature between that case, and other cases cited by appellant, and this case.

It seems to us, that the demands of equity and good conscience in this case will be satisfied, if we treat the rental value of the property as received by the occupying tenants as advancements to be brought into hotch-pot, the same as the legacies collected in the *Hines Case*, 243 Mo. 480, *supra*, pending the will contest, and allow no interest thereon, as was ruled in that case.

IX. But we agree with the contention of appellant's learned counsel that the personal property of the deceased, Patrick Byrne, Sr., should also be brought into **Personal Property** hotch-pot in this proceeding. In this regard, the case of *Hines v. Hines*, hereinbefore mentioned, 243 Mo. 480, is, in our judgment, decisive. In that case, the testatrix died in the State of Arkansas, leaving a will, which was duly probated in that State. She had two farms in Missouri, as well as real estate and personal property in Arkansas. A duly certified copy of her will, and the probate thereof in Arkansas, was filed in the county in Missouri where her Missouri lands were situate. The devisees and legatees in Arkansas, as well as in Missouri, took possession of the respective lands and legacies bequeathed and devised to them by the will. Afterwards the will was set aside,

in a contest instituted in this State. A partition suit was subsequently brought in this State to partition the lands in Missouri, and the court required the devisees to bring into hotch-pot and account for the value of the land and the legacies so received by them in Arkansas before they could participate as heirs in the Missouri property. The court held that they should be charged therewith as advancements.

But it may be said that, in that case, there does not appear to have been a final settlement made and approved by the probate court in the State of Arkansas, and that the final settlement made by the administrator in the case before us, pending the will contest, bars any inquiry into the rights of the cotenants to the personal property which was distributed in such final settlement. But we disallow this contention, for the reason, as we have already seen, the final judgment in the suit to contest the will declaring that the testator died intestate, restored all the heirs to their rights of inheritance under the law. Said final settlement was made and the property divided thereby on the theory that the will controlled, but it was so made subject to be set aside and annulled in case of a successful contest of the will. It could have no greater effect than a conveyance by one of the devisees of the land, before the contest was determined, or the time for instituting it had expired. In all such cases, the purchaser takes subject to having his title divested, in case of a successful contest of the will, either pending or subsequently instituted. In fact, the contest is pending from the date of the probate of the will in the probate court, and the subsequent institution of the contest proceedings in the circuit court is but an appeal from the judgment of probate in the probate court. [McIlwrath v. Hollander, 73 Mo. 105; Boothe v. Cheek, 253 Mo. 132-3; Hines v. Hines, 243 Mo. 500.]

The record shows that as devisees under said will of Patrick Byrne, Sr., the personal property was dis-

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tributed as follows, by the administrator in his final settlement on August 18, 1893; To C. E. Byrne, \$500; Mary J. Byrne, \$1,200; Anna Byrne, \$1,200; Ella Byrne, \$1,200; John T. Byrne, \$1,200; Rose Byrne (widow) \$2,500. The five heirs named received in all \$5,103.15 and each was entitled to one-eighth thereof, or \$637.69, and the other heirs to the same amount.

The \$2,500 or share received by the widow cannot be taken into account in this proceeding, because her estate and the interest of the different heirs or legatees therein, cannot be properly considered in this case, and the lower court was right in refusing to do so. And appellant makes no claim in her brief here on account thereof.

Consequently, in adjusting the claims of the parties against each other in this case they should each be adjudged to receive and be required to account for the personal property aforesaid on the basis that each was entitled to one-eighth thereof, or \$637.69, and no more. But no interest should be charged, because in this accounting the legacies so received are considered as advancements and interest is not chargeable thereon. [Hines v. Hines, 243 Mo. l. c. 500.]

X. We disallow the claim for waste against John T. Byrne in cutting and selling the cedar timber off of the homestead land. The evidence shows the mother **Waste.** received the proceeds, that said John T. Byrne acted simply as agent for her in the transaction. He is consequently not accountable therefor.

XI. In addition to charging the respondents, John T. Byrne and Patrick Byrne with rents from the time of the trial below up to the time of the sale of the property in partition, at the rate hereinbefore indicated in this opinion, they should be credited with any and all taxes which they have paid or may pay, since the time of such trial, and up to the time of such sale.

The result is, that we reverse and remand the case, with directions to the circuit court to modify and re-

enter its decree herein, so as to conform to this opinion regarding the allowance and charges, for and against each and all of the parties in this case, respondent as well as appellant, as herein determined, and to make such alterations and changes in its decree as may be necessary to carry out the order of sale of the property in partition heretofore made. In all other respects, the decree of the lower court is affirmed. *Ragland, C.*, concurs; *Brown, C.*, not sitting.

PER CURIAM:—The foregoing opinion by *SMALL, C.*, is adopted as the opinion of the court. All of the judges concur.

IRA BURRUS, Appellant, v. VALENTINE HENDRICKS.

Division One, July 11, 1921.

1. **APPEAL: No Abstract of Record Proper: Amended Rule 31.** The amendment to Rule 31 of the Supreme Court (adopted December 31, 1920) means that if matters of record proper are omitted from the record proper, but are shown in the bill of exceptions in appellant's abstract, that will be sufficient, unless the respondent must file a corrected abstract of and from the record proper, objects as provided in said rule, but if such objection is made apshowing the record entries referred to in respondent's objections as was required before said amendment was made.
2. ———: ———: ———: **Uncorrected by Additional Abstract.** Where appellant's original abstract fails to show in the record proper that a final judgment was entered, that a motion for a new trial was filed and overruled, that a bill of exceptions was signed, sealed and filed, or that an appeal was allowed, although such record matters are set forth as a part of the bill of exceptions; and respondent files objections thereto, pointing out such deficiencies; and appellant's additional abstract sets forth as a part of the record proper a copy of the judgment, but contains no copy

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or summation of record entries showing a motion for a new trial was filed and overruled, or that a bill of exceptions was approved and filed, or that an appeal was allowed, there is nothing for the Supreme Court to consider except the pleadings and judgment, and there being no error upon their face, the judgment will be affirmed.

Appeal from Pike Circuit Court.—*Hon. E. B. Woolfolk*, Judge.

AFFIRMED.

Pearson & Pearson and *Hostetter & Haley* for respondent.

The record in this case is fatally defective in that there is no showing from the record proper of the filing or overruling of a motion for a new trial, the rendition of a final judgment, the allowance of an appeal, or the allowance of the signing or filing of a bill of exceptions. *Tracy v. Tracy*, 201 S. W. (Mo.) 902; *Squares v. Peters*, 202 S. W. (Mo.) 530; *Livasy v. Jackson*, 204 S. W. (Mo.) 186; *Fleiger v. U. R. Co.*, 204 S. W. (Mo.) 182; *O'Hara v. Berthold*, 204 S. W. (Mo.) 1089, 1090; *Harding v. Bedoll*, 200 Mo. 625, 634; *Bower v. Daniels*, 198 Mo. 289, 317; *St. Charles ex rel. v. Deemar*, 174 Mo. 122; *State ex rel. v. Woods*, 234 Mo. 16.

Tom B. McGinnis, *Lulu M. Collins*, *Frank J. Duvall* and *Guy M. Wood* for appellant.

SMALL, C.—Appeal from the Circuit Court of Pike County. On March 23, 1921, appellant served upon the respondent her abstract of the record and brief herein. On March 30, 1921, respondent served upon appellant his written objections to said abstract of the record, in words and figures as follows:

"In the Supreme Court of Missouri.

"Division No. 1.

"April Term, 1921.

"IDA BURRUS, Appellant

v.

"VALENTINE HENDRICKS, Respondent.

} Case No. 22,184.

"RESPONDENT'S OBJECTION TO APPELLANT'S ABSTRACT.

"Now comes Valentine Hendricks, respondent in the above-entitled cause, and makes the following objection to the appellant's abstract of the record, together with his reasons therefor, to-wit:

"Said abstract fails to set out any of the direct examination of Valentine Hendricks, and such direct examination would disclose the fact affirmatively that he made no promise of marriage to Mrs. Burrus, and it would further disclose more fully the agency of Lulu M. Collins for Mrs. Burrus, and in that respect it would further tend to justify the admission of the testimony of S. M. Gillum, a witness for respondent, who testified to a conversation between him and Lulu M. Collins, and such omitted testimonies would be useful in giving this court a clear idea of the situation, and would further tend to justify the action of the jury in its decision that there was in a point of fact no marriage engagement at any time between the respondent and the appellant.

"Said abstract fails to set out any of the cross-examination of the appellant Mrs. Burrus, which omitted testimony would bear upon same issues, and would also tend to make respondent's position in the eyes of this court justifiable and tenable in every particular.

"Said abstract fails to show in the record proper that a final judgment was entered, or that a motion for a new trial was filed and overruled, or that a bill of exceptions was allowed and filed and signed, or that an appeal was allowed. Such abstract therefore does not show facts sufficient to invest this court with full

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and complete jurisdiction to hear and determine this cause on its merits on account of such deficiencies.

“PEARSON and PEARSON and

“HOSTETTER and HALEY,

“Attorneys for Respondent.”

The original abstract of appellant contains the matters of record proper complained of by respondent in the above notice in the bill of exceptions, but not in the part of said abstract purporting to abstract the record proper. Nor does said original abstract state the appeal was duly taken, nor that said bill of exceptions was duly filed, as authorized by Rule 31 of this court.

On April 22, 1921, appellant served her additional abstract of the record upon the respondent, which contained a copy of the judgment rendered Tuesday, June 24, 1919, in the court below, but failed to contain a copy or abstract of any other entry of the record proper in the case, complained of by respondent in said objections to appellant's original abstract.

The respondent in his brief insists that said additional abstract does not comply with the amendment to Rule 13 of this court adopted December 31, 1920. Said amendment is as follows:

“If in any case any matter which should properly be set forth in the abstract as a part of the record proper, shall appear in the abstract as a part of the bill of exceptions, or *vice-versa*, such matter shall be considered and treated as if set forth in its proper place, and all objections on account thereof shall be deemed waived, unless the other party shall, within fifteen days after the service of such abstract upon him, specify such objections and the reasons therefor in writing and serve the same upon the opposing party or his counsel; and in the event such objection be so made, the other party may within ten days from the service of such written objection upon him or his counsel, correct his abstract so as to obviate such objection, if under the facts as shown by the record proper or the bill of exceptions

in the trial court, such correction can truthfully be made.”

Prior to the adoption of the above amendment, unless all matters of record proper were shown in the abstract of the record proper, or there was a statement, as authorized by Rule 31, that the appeal was duly taken and the bill of exceptions duly filed, such abstract of record proper was fatally defective, although such matters of record proper may have appeared in the bill of exceptions in the appellant's abstract of the record. [Tracy v. Tracy, 201 S. W. 902, l. c. 903; Squares v. Peters, 202 S. W. 530; Livasy v. Jackson, 204 S. W. 186; Fleiger v. United Railways Co., 204 S. W. 182; Bower v. Daniel, 198 Mo. 289, l. c. 317; St. Charles ex rel. v. Deemar, 174 Mo. 122.]

Respondent's learned counsel insist that, under the above amendment to Rule 13, in response to his timely objections in writing, above set forth, it was incumbent upon the appellant to obviate such objections by filing an additional or corrected abstract of and from the record proper, showing the record entries of the filing and overruling of the motion for a new trial, and the signing, allowing and filing of the bill of exceptions.

We think this is a correct interpretation of said amendment. Said amendment means that if matters of record proper are omitted from the abstract of the record proper, but are shown in the bill of exceptions in appellant's abstract, that will be sufficient, unless the respondent objects, as provided in said amendment, in which case the appellant must file a corrected abstract of and from the record proper, showing the record entries referred to in respondent's objections, as was required before said amendment was adopted. The appellant, in this case, having in her additional abstract only set forth a copy of the judgment, and omitted to insert therein an abstract of and from the record proper, showing the filing and overruling of the motion for new trial, and the signing, allowing and filing of the bill of exceptions,

there is nothing before us for consideration, except the pleadings and the judgment, and there being no error upon the face thereof, under the foregoing authorities, we have no alternative except to affirm the judgment.

It is so ordered. *Ragland, C.*, concurs; *Brown, C.*, not sitting.

PER CURIAM:—The foregoing opinion by SMALL, C., is adopted as the opinion of the court. All of the judges concur.

JULIUS PIETZUK v. KANSAS CITY RAILWAYS COMPANY, Appellant.

Division One, July 11, 1921.

1. **RECORD ON APPEAL: Affidavit: Error of Stenographer.** On an appeal the bill of exceptions imports verity; and an affidavit made by the attorney for appellant, to the effect that the word "satisfactory" was used by him in a question he propounded to a juror on his *voir dire* examination, and not the word "unsatisfactory" as the bill of exceptions shows, availleth nothing, the trial court having made no order directing an amendment of the record.
2. **JUROR: Prejudice: No Challenge or Objection.** Where the juror on his *voir dire* examination was not challenged, and no objection was made to his competency or qualifications, an objection first appearing in the motion for a new trial that he was prejudiced against appellant cannot be considered on appeal. And in this case had the juror been timely challenged on the facts disclosed by the affidavits filed in support of the motion for a new trial, such challenge should have been overruled.
3. **NEGLIGENCE: Instruction: Inclusion of Specific Allegation.** Where the petition alleges that the conductor of a street car, which had stopped at an elevated station to take on passengers, caused said car to start forward, "and before plaintiff was able to get into the vestibule of said car or on the platform of said car, and while yet standing on the steps of said car with one foot, the conductor closed the door of said car while same was moving, pushed plaintiff off the step and, as a result thereof, plaintiff was thrown vio-

lently from said car to the street below," an instruction requiring the jury to find that the "conductor negligently caused said car to start forward and negligently closed the door of said car while said car was moving, and as a direct result thereof the plaintiff was thrown from said car to the street below and injured" omits no specific allegation. In requiring the jury to find that plaintiff was "thrown from" the car it used words of like significance as the allegation "pushed plaintiff off said car."

4. ———: **Physical Impossibility: Peremptory Instruction.** The evidence in this case does not show that it was a physical impossibility for the plaintiff to have been injured in the manner claimed by him and his witnesses, and therefore the trial court did not err in refusing to give to the jury a peremptory instruction to find for defendant.
5. **ARGUMENT TO JURY: Character of Defendant: Withdrawal.** In his closing argument to the jury plaintiff's counsel said that no jury would live long enough to sit on a case against the defendant company in which that company would not come in without a defense of some kind. Defendant's counsel objected that the remark was outside of the record, wholly incompetent and prejudicial, and asked that plaintiff's counsel be reprimanded. The court directed counsel to proceed, to which action defendant's counsel excepted. Thereupon plaintiff's counsel withdrew the remark, and substituted another to the effect that the defendant company could not be expected to come into court and admit liability, to which no objection was made. *Held*, that the trial court was in a better position to determine the propriety and effect of the first statement made by plaintiff's counsel than is the appellate court; that the fragmentary part of the counsel's speech was not sufficient to have influenced the jury in arriving at their verdict; and that if there was any transgression of proper argument it was cured by its withdrawal.
6. **VERDICT: Contrary to Greater Weight.** Where the record is devoid of anything which could give rise to a logical conclusion that the jury were prejudiced, or corrupt, or grossly negligent, or that they disregarded the instructions of the court, their verdict cannot on appeal be set aside as contrary to the greater weight of the evidence, although only three witnesses testified to the same facts showing defendant was guilty of the negligence charged, and six for defendant testified to the contrary, only one of whom identified plaintiff as the man who was injured.
7. **EXCESSIVE VERDICT: \$15,000.** Plaintiff, in attempting to board a street car from an elevated platform, was thrown to the street,

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thirty feet below. He sustained a broken jaw, a broken chest, his legs were hurt, and five or six teeth were knocked out; there was a fracture at the base of the skull, which produces a dizziness in the head, and makes it dangerous for him to work about machinery or upon a scaffold; the bones of the jaw are not in perfect apposition, the teeth being out of line; there is an irritability in the spinal cord, and his symptoms are nervous dizziness and occasional headaches; his physician's bill was \$185, and he was earning \$572 a year prior to the accident, was then thirty-three years of age, and two years and a half afterwards went to work again, and his chances of complete recovery and of permanent impairment are about equal. *Held*, that a verdict for \$15,000 is excessive by \$4,000.

Appeal from Jackson Circuit Court.—*Hon. Clarence A. Burney*, Judge.

REVERSED AND REMANDED.

Chas. N. Sadler and *Mont T. Prewitt* for appellant.

(1) The court erred in failing and refusing to grant defendant a new trial for the reason that venireman C. (Charles) G. Green did not fully, accurately, and truthfully answer all questions propounded to him on the *voir dire* examination, particularly concerning any present or previous feeling of bias or prejudice against defendant growing out of litigation against defendant, resulting in prejudice in that defendant was caused to exercise one of its peremptory challenges in removing said venireman, when a truthful disclosure would have furnished cause for trial court to have excused him. *Vessels v. Light Co.*, 219 S. W. 80; *Theobald v. Transit Co.*, 191 Mo. 395; *Carroll v. United Rys.*, 157 Mo. App. 247, 264; *Gibney v. Transit Co.*, 204 Mo. 704; *State v. Wyatt*, 50 Mo. 309; *Hughes v. Ry.*, 60 S. W. (Texas) 562. (2) The court erred in giving instruction numbered 1 requested by plaintiff. *State ex rel. Coal Co. v. Ellison*, 270 Mo. 645, 653; *Degonia v. Ry.*,

224 Mo. 565, 589; Northam v. Rys., 176 S. W. 227; McGrath v. Ry., 197 Mo. 105; Davidson v. Transit Co., 211 Mo. 320, 361; State ex rel. Newspaper Assn. v. Ellison, 176 S. W. 11; Roscoe v. Ry., 202 Mo. 576, 588; Bank v. Murdock, 62 Mo. 70; Hamilton v. Crowe, 175 Mo. 634.

(3) The court erred in refusing to give to the jury the peremptory instruction directing a verdict in favor of defendant, requested at the close of all the evidence, under the physical-facts doctrine. State v. Bryant, 102 Mo. 24, 32; State v. Turlington, 102 Mo. 642, 663; Daniels v. Ry., 177 Mo. App. 280; Scroggins v. Met., 138 Mo. App. 215, 219. (4) The court erred in refusing to sustain the motion for new trial because of the misconduct upon the part of plaintiff's counsel in making incompetent, prejudicial and improper argument. Beck v. Rys., 129 Mo. App. 7, 23; Rice v. Sally, 176 Mo. 107, 146; Robertson v. Wabash, 152 Mo. 382; Brown v. Ry., 66 Mo. 588; Neff v. City of Cameron, 213 Mo. 350, 369; Williams v. Ry., 123 Mo. 573; Collier v. City of Shelbyville, 219 S. W. 713. (5) The court erred in refusing to sustain the motion for new trial on the grounds that the verdict and judgment are contrary to the greater weight of the evidence and because the jury in arriving at their verdict wholly disregarded the instructions given by the court. Price v. Evans, 49 Mo. 396; Lehnick v. Met., 118 Mo. App. 611; Chitty v. Ry., 148 Mo. 64, 78; Spiro v. Transit Co., 102 Mo. App. 250, 264; Spohn v. Mo. Pac. Ry. Co., 87 Mo. 74; State v. Fannon, 158 Mo. 149; Payne v. Railroad, 136 Mo. 362; Hook v. Railroad, 162 Mo. 569; Fugler v. Bothe, 117 Mo. 475, 501. (6) The verdict is excessive. Rigg v. C. B. & Q., 212 S. W. 878; Hulse v. St. Joseph Ry. Co., 214 S. W. 155; Dominick v. Mining Co., 255 Mo. 463; Campbell v. United Rys., 243 Mo. 141, 159; Stolze v. Transit Co., 188 Mo. 581; Norris v. Ry., 239 Mo. 695, 704; Lyons v. St. Ry., 253 Mo. 143, 163; Bragg v. Street Ry. Co., 192 Mo. 351; Willits v. C. B. & Q., 221 S. W. 65.

W. W. McCaules and Hogsett & Boyle for respondent.

(1) The court did not err in refusing a new trial because of the answers of venireman Chas. G. Green on *voir dire* examination. (a) The venireman was not challenged by the defendant and there is no objection or exception in the record to any ruling of the trial court relating to the matter. Therefore defendant is in no position to complain. *City of Tarkio v. Cook*, 120 Mo. 1, 11. (b) The affidavits of its claim agents filed by defendant do not show any prejudice on Green's part. *McManama v. United Rys. Co.*, 175 Mo. App. 43; *Kennelly v. K. C. Rys. Co.*, 214 S. W. 237; *Albert v. Ry. Co.*, 192 Mo. App. 665; *Tawney v. Rys. Co.*, 262 Mo. 602; *Shore v. Dunham*, 178 S. W. 900; *State v. Green*, 229 Mo. 642; *Hudson v. Ry. Co.*, 53 Mo. 525; *State v. Ivy*, 192 S. W. 737; *In re Bowman*, 7 Mo. App. 568. (c) The question as to the competency of jurors is one addressing itself to the sound discretion of the trial court and that discretion will not be interfered with unless palpably abused. *State v. Rasco*, 239 Mo. 535; *Kennelly v. Rys. Co.*, 214 S. W. 237; *McManama v. Railroad*, 175 Mo. App. 50, 51. (2) The court did not err in giving Instruction Number 1 requested by plaintiff. The instruction is not broader than the petition but is strictly and literally limited to the pericse negligence alleged therein. *Riley v. City of Independence*, 258 Mo. 682; *Johnson v. Met. St. Ry. Co.*, 177 Mo. App. 300; *Schwanenfeldt v. St. Ry. Co.*, 187 Mo. App. 592; *Ottoby v. Trust Co.*, 196 S. W. 430; *Green v. Standard Oil Co.*, 199 S. W. 749; *Quinley v. Traction Co.*, 180 Mo. App. 300, 302; *Little v. Railroad*, 139 Mo. App. 55. (3) The court did not err in refusing the peremptory instruction requested by defendant. (a) The rear end of the car stopped only twenty-five feet from the west edge of the platform, so that plaintiff's estimate of the distance he was carried before he fell was absolutely

accurate and in accordance with the physical facts. *Costello v. Kansas City*, 219 S. W. 391. (b) A court should not take a case from the jury on the "physical facts" theory merely because the varying estimates of witnesses as to distance, made in a moment of extreme excitement, are not mathematically exact. *Swigart v. Lusk*, 192 S. W. 141; *Hays v. Ry.*, 182 Mo. App. 1. c. 402, 403; *Clark v. Long*, 196 S. W. 412. (c) The estimates as to the length of the station platform and the length of the car were given by defendant's witnesses, and the court could not say as a matter of law that these estimates were correct, their credibility being for the jury. *Ganey v. Kansas City*, 259 Mo. 660; *Gardner v. Railroad*, 223 Mo. 389. (d) It will hardly do to say that the evidence conclusively shows that plaintiff boarded a moving car, when three witnesses positively testified that it was standing still. (4) There was no improper or prejudicial argument on the part of plaintiff's counsel. (a) The statement objected to was nothing more than a tribute to the resourcefulness and ability of defendant's able counsel who tried the case. The statement was made goodnaturedly and in no spirit of criticism of the defendant, and was evidently so understood by the trial court who heard all the argument. *Bishop v. Inv. Co.*, 229 Mo. 733. (b) The trial court was in much better position to judge the meaning and effect of the statement complained of than this court, for the trial judge heard all of the argument, while only an isolated sentence thereof is presented to this court. The trial court evidently considered defendant's objection to the statement as utterly trivial, as indeed it was. (c) But even giving to the argument the strained construction which defendant strives to place upon it, the argument was not an improper one and did not transcend the limits of legitimate debate. *Paul v. Dunham* 214 S. W. 265; *City of Kennett v. Const. Co.*, 273 Mo. 280; *Huckshold v. Ry. Co.*, 90 Mo. 558; *Ostertag v. Railroad*, 261 Mo. 475, 479; *Bradley v. City*, 90 Mo. App. 424;

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Turnbow v. Kansas City Rys. Co., 211 S. W. 46; Pope v. Ry., 175 S. W. 955; Gidionsen v. Ry. Co., 129 Mo. 403; Bank v. Camery, 176 S. W. 1077; Whelan v. Chemical Co., 188 Mo. App. 605; Cook v. Neely, 143 Mo. App. 639; Franklin v. Railroad, 188 Mo. 545; Lilly v. K. C. Rys. Co., 209 S. W. 972; Ins. Co. v. Railroad, 174 Mo. App. 549. (d) The defendant did not specifically except to the failure of the court to reprimand plaintiff's counsel, nor did it move to dismiss the jury or to declare a mistrial. So in no event is there anything preserved for appellate review. McKinney v. Laundry Co., 200 S. W. 118; Harriman v. Dunham, 196 S. W. 443; Torreyson v. Ry., 246 Mo. 706; Ostertag v. Railroad, 261 Mo. 479; State v. Chenault, 212 Mo. 137; Peck v. Traction Co., 131 Mo. App. 143; Estes v. Railroad, 111 Mo. App. 5; Payne v. Ry., 129 Mo. 405; State v. Taylor, 134 Mo. 158. (e) When defendant objected to the argument, plaintiff's counsel immediately withdrew the remark objected to, and without objection substituted in place of it another argument to which the defendant made no objection. This leaves no room for complaint on defendant's part. Green v. Standard Oil Co., 199 S. W. 750; Hollenbeck v. Ry. Co., 141 Mo. 98; Grace v. Ry. Co., 212 S. W. 42; Almond v. Modern Woodmen, 133 Mo. App. 390; Cross v. Sedalia, 203 S. W. 648; Sinclair v. Tel. Co., 195 S. W. 558; Wellman v. St. Ry. Co., 219 Mo. 126; Collier v. Moving Co., 147 Mo. App. 700. (5) The verdict and judgment are not contrary to the greater weight of the evidence. (a) This court will not weigh the evidence in a law case. Linderman v. Carmin, 255 Mo. 62; Hutchinson v. Safety Gate Co., 247 Mo. 71; Howell v. Sherwood, 242 Mo. 513; Norris v. Ry. Co., 239 Mo. 695; Moore v. King, 178 S. W. 124. (b) The jury and the trial court have found that plaintiff's case is sustained by the greater weight of the evidence. This concludes the defendant. Authorities supra. (6) The verdict is not excessive. (a) In passing on the size of the verdict this court will consider the decreased purchasing

power of money. *Hurst v. Railroad Co.*, 219 S. W. 568; *Hulse v. Ry. Co.*, 214 S. W. 156; *Duffy v. Ry. Co.*, 217 S. W. 883; *Hays v. Ry. Co.*, 183 Mo. App. 608. (b) In the light of the late cases a verdict of \$15,000 is not excessive for the injuries which the plaintiff was shown by the undisputed evidence to have sustained. *Smith v. Ry. Co.*, 213 S. W. 485, 486; *Holzemer v. St. Ry. Co.*, 261 Mo. 379; *Hubbard v. Railroad Co.*, 193 S. W. 579; *Shaw v. Kansas City*, 196 S. W. 1094; *Miller v. Harpster*, 273 Mo. 605; *Myers v. City of Independence*, 189 S. W. 817.

ELDER, J.—This is an action for damages for personal injuries alleged to have been sustained by plaintiff in being thrown from a street car which he was undertaking to board, operated by defendant on an elevated structure at Armour Station, on the state line between Kansas City, Missouri, and Kansas City, Kansas.

On March 18, 1916, the defendant was operating a line of elevated street railway connecting Kansas City, Missouri, and Kansas City, Kansas, running across the state line between Missouri and Kansas. At the intersection of the state line and what was known as Central Avenue, it maintained an elevated station called Armour Station. The tracks at that point were about thirty feet above the street level. The station platform was about fifty to fifty-five feet in length, from east to west, and at the west end thereof was a railing or fence which extended out to within three feet and four inches of the north rail of the west-bound track. On the north side of the platform, midway thereof, and about four or five feet north of the tracks, was a shelter house. About the center of the shelter house was a door leading out upon the station platform. Passengers intending to take a west-bound car ascended from the street by a stairway to the shelter house, passed through the shelter house and out upon the platform where cars customarily stopped to receive and discharge passengers.

Plaintiff, who is a Russian, was examined through an interpreter. He testified that he was thirty-three years of age, had come to America in August, 1913, lived in Kansas City, Kansas, was employed at the time of the accident at Armour's, and had previously been working steadily for that concern in the wool house, where wool was washed and dried, earning about \$10 or \$11 a week; that from about 4 p. m. to 6:40 or 7 p. m. on the aforesaid 18th day of March, he had visited his sister at St. Mary's Hospital in Kansas City, Missouri, and had then taken a street car and on his way home had stopped off at a saloon near the state line to cash his pay check, it being Saturday and pay day; that while in the saloon a friend, Dominick Grib, had bought him two glasses of beer, and plaintiff had purchased a half pint of whiskey, which he took with him; that at "fifteen or twenty minutes to nine" he and Grib (who at the time of the trial plaintiff testified was in France) left the saloon and ascended to the elevated platform at Armour Station, plaintiff intending to take passage upon a west-bound Central Avenue car; that when he went out upon the platform no car was there, but many people were waiting; that after he had waited "maybe two or three minutes," the Central Avenue car came and stopped to take on passengers, it being then full of people; that several of the persons waiting proceeded to get upon the car at the rear entrance, but that many more were left and "didn't get in;" that plaintiff was in the rear of those who got on, and had progressed as far as to have his right foot on the vestibule platform of the car, his left foot on the step, and had taken hold of the handle bars with both hands; that when he got on the car it was standing still, with the vestibule door open; that while in the position above mentioned the conductor rang the bell and the car started; that the car moved forward about twenty-four to thirty feet when the conductor shut the folding vestibule door, which struck plaintiff in the chest and pushed him off the car; that the rear end

of the car was then about six feet beyond the platform, and he fell to the street pavement about twenty-five feet below, striking on his head and feet or legs; that he became unconscious, and when he came to he was in St. Mary's Hospital.

On cross-examination plaintiff testified that while in the saloon before the accident, he had nothing to drink but two glasses of beer; that he did not attempt to board the car while it was in motion, or run after it and get on while it was moving; that he knew he must not board a car while it was moving.

On re-direct examination he stated that he had purchased the half pint of whiskey for one Alexander Cardash at the latter's request, and had not opened the bottle.

Adam French testified on behalf of plaintiff, through an interpreter, that he had known plaintiff a little in Russia; that he was standing on the platform at the station when plaintiff attempted to board the car in question, and that the car was then standing still; that the car was full, with many people in the rear vestibule, and that there were about twenty people waiting to take the car; that when plaintiff got on, the conductor rang the bell and the car started, with plaintiff standing on the steps; that when the rear end of the car was about twenty-four or twenty-five feet "off the platform" plaintiff fell to the street below, his body striking "towards Kansas" (or west) "from the foot of the steps." On cross-examination the witness stated that he had been in the saloon with plaintiff and Grib, and that Grib had bought them all two glasses of beer; that he had been standing on the platform, among the people who were waiting, about two or three minutes before the car came up; and that he wanted to take the same car as plaintiff, but that there was no way of getting on, as it was too full.

Alexander Krivinia, a witness for plaintiff, testified that he was on the station platform the night in question waiting for a Central Avenue car; that he had been wait-

ing "about two or three minutes," when the car came and stopped; that it was full of people, with a number waiting to get on; that some got on, but that he could not get on, although he tried; that he saw plaintiff, whom he had often seen before, attempting to board the car at the rear; that plaintiff "was on the step with one foot, with another foot on the platform inside of the car;" that when plaintiff got on the step the conductor rang the bell and the car started, with the door open; that plaintiff tried to get in the car, but was unable to do so, as it was full; that the conductor shut the door, pushing plaintiff off the car, and he fell, being then "about thirty feet" beyond the platform. On cross-examination the witness stated that the accident happened "pretty near nine o'clock."

George Chess, ambulance driver for the Police Department of Kansas City, Kansas, a witness for plaintiff, testified that when he arrived at the scene of the accident plaintiff's body was lying on the street about thirty feet west of the station, or ten feet west of the foot of the stairway, between the curb and the surface car-tracks. On cross-examination witness stated that Armour Station was elevated about twenty-five or thirty feet above the street surface; that the station platform was about fifty feet long; that when plaintiff was picked up he was unconscious, and witness did not examine his breath to see if he was intoxicated; and that neither the bottle of whiskey which was in plaintiff's coat pocket, or the seal thereon, was broken.

William Lawson, police officer, a witness called by plaintiff, testified that he was standing across the street from where plaintiff fell; that he "heard a noise and looked over, and saw this man lying in the street and went over there."

The evidence for defendant may be summarized as follows:

The deposition of L. C. Biederman, engaged in the bakery business at Keytesville, Missouri, was read in

evidence. The witness testified that on March 18, 1916, he resided in Kansas City, Kansas, and that about 9:30 p. m. of that day he was going home in the back vestibule of a west-bound "pay-as-you-enter" street car; that as he got on the car at Armour Station, after a number of other people, the conductor closed the door; that "after the car had started, some one run out of the station and tried to get on the car. It was right close to the edge of the platform;" that the car was then in motion and when "this man" grabbed the rear end of the car he was within about six or seven feet of the west end of the platform, with the car going "probably three or four miles an hour." On cross-examination witness said that when he saw "this man" first approach the car it was about forty feet from the east end of the platform; that he supposed the platform was "probably sixty feet" in length; that he first saw the man as he ran out of the station.

George Heinzman testified that he helped his father run a lunch wagon across the street from Armour Station; that on the night in question, at 9:35 p. m., he was standing at the east end of the station platform; that "I was going up there to go home and there was a Central Avenue car come up and it stopped and loaded on about—oh, I should say—ten or fifteen passengers, and just about the time it started I heard somebody holler and I seen a man running, and at that time the car had run about thirty feet and it seemed like he either tried to get hold the middle hand-hold or the last one, and just about that time he went down. It just seemed like it happened in about a second." On cross-examination the witness stated that after the man succeeded in getting hold of the handrail he rode on the step of the car, "on the platform," for about ten feet; that immediately upon passing the railing at the end of the platform he fell; that witness then went down to the street, and he lay about ten feet west of the west end of the platform.

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C. M. Snow testified that he was employed by Swift's Packing Company and prior to 1917 had been employed by defendant as a motorman, being so employed on March 18, 1916; that on the night of that day, about 9:30 p. m., he was standing on the platform at Armour Station, just to the west of the station door, waiting for a car on which to go home, when a Central-Fairmount car came along. Describing the accident he said: "Well, as that wasn't the car I wanted to take, I wanted either Chelsea or Quindaro car, I didn't pay any attention, and I didn't attempt to get on it, and there was several people got on the car . . . After they was all on that wanted that car, the conductor closed his door on the car and started the car, and after—when the car got to the even, or a little past of even, which would be a little west of that station door, there was some man come running out right fast and he came running out, he was going west, south, and he turned like this (indicating) and boarded the car on th outside, and he was on the car just a second, and when he went off he went off of the edge of the platform, down to the pavement below." On cross-examination witness stated that the man who ran after the car was running twelve miles an hour, or "a third faster than the car;" that there were three west-bound lines of cars operating over the elevated tracks in question, all going to different places; that a man in the shelter house would not know what car had stopped there until he got outside, so as to see it; and that he would not know the man who ran after this particular car if he saw him.

W. T. Willhite testified that he was in the rear vestibule of the car, about 9:35 p.m.; that "we stopped there at the Armour Station and took on a few passengers, about eight or ten, and got them in there and the conductor closed the door and gave the signal to go on, and as the car started up I saw some man start towards the door as the car got a little past the door of the station, and he grabbed for the railing and rode I should judge eight or ten feet and it looked like he jumped right off

again before the conductor could get out of the door to get him. He had given the signal to stop, and it looked like this man missed his footing or something and went down over the viaduct. That was at the west end." Witness further said that the car had run about twenty-five or thirty feet from the east end of the viaduct when the man undertook to grab hold of it, and that the car was running five or six miles an hour.

The deposition of Richard A. Coon was read in evidence. His testimony, which was taken on August 27, 1918, was to the effect that he was then a riveter for the Standard Ship Building Corporation at Shooters Island, New York, and expected to enter the military service within a few days; that on March 18, 1916, he was conductor of the car on which the accident occurred; that "we stopped at Armour Station, state line on the elevated structure, and loaded possibly twenty to twenty-five passengers; the car having all on board that seemed to want to get on, I closed the door, gave the motorman the signal to go ahead. After the car had run about thirty to thirty-five feet, two or three men came out of the station door on the elevated, the first one tried to catch the car, and in jumping, as near as I could make out, caught the upright rail with his hand and possibly had one foot on the step. I gave the motorman the emergency signal to stop and opened the door at the same time to try to grab the man, and before I could do so, the railing on the west end of the elevated platform brushed him off, and he fell in the street below. As soon as the car was stopped the motorman called an ambulance and practically done all we could to aid the man. We afterward got the names and addresses of all of the witnesses we could, made a report of the matter to barn headquarters, and boarded our car and went on to the end of the line.

"Q. What was the name of this man who was hurt?

A. The name I got was Julius Pietzuk.

"Q. Was this car standing still or in motion at the time this man attempted to board it? A. It was in motion.

"Q. Is it a fact that this man attempted to board this car when it was standing still on this elevated structure at Armour Station? A. No, sir, the man was not even in sight when the car was standing still." Witness further testified that the car was about forty feet long.

J. E. Shindler, auto mechanic, testified that he was sitting on the rear longitudinal seat of the car, facing south; that "the conductor closed the car and the motorman started the car, and there was a man on the platform there run out to get on; grabbed on the steps, and I presume that the railing that came out there knocked him off—was the only thing I could see that did it."

Frank M. Wisdom, connected with the claim department of defendant, testified that Dr. H. L. Regier, who had first attended plaintiff after the accident, and who testified for plaintiff, had told witness that "the man had the evidence of having been drinking; he could tell that very easily."

None of the witnesses for defendant, except the conductor of the car, identified plaintiff as the man they saw running after the car. Witnesses Snow and Shindler, who were asked if they could identify him, said they could not.

The foregoing outlines in general the case made. Further matters pertinent to the questions presented for review will be referred to in the course of the opinion.

The negligence charged in the petition is pleaded as follows: "The conductor without waiting for plaintiff to get safely within said car signaled the motorman in charge of said car to start said car forward; that the motorman did, in obedience to said signal, start said car forward, and before the plaintiff was able to get into the vestibule of said car or on the platform of said car, and while yet standing on the step of said car with one foot the conductor closed the door of said car while same was moving, pushed plaintiff off the step and, as a result thereof, the plaintiff was thrown violently from said car to the street below, a distance of about thirty or thirty-five feet."

The answer was a general denial, coupled with a plea of negligence of the plaintiff in attempting to board a moving car.

The jury returned a verdict for plaintiff assessing his damages at \$15,000, and the court rendered judgment accordingly. After an unsuccessful motion for a new trial and motion in arrest of judgment, defendant appeals.

The case has been well briefed in this court by counsel for both appellant and respondent.

I. Defendant assigns as error that "the court erred in failing and refusing to grant defendant a new trial for the reason that venireman C. (Charles) G. Green did not fully, accurately, and truthfully answer all questions propounded to him on the *voir dire* examination, particularly concerning any present or previous

Juror: feeling of bias or prejudice against defendant
Prejudice. growing out of litigation against defendant, resulting in prejudice in that defendant was caused to exercise one of its peremptory challenges in removing said venireman, when a truthful disclosure would have furnished cause for the trial court to have excused him."

With respect to the *voir dire* examination of the juror Green, the record shows the following:

EXAMINATION BY MR. HOGSETT:

"Q. Have any of you gentlemen ever been sued for personal injuries? A suit brought against you by any one claiming to have been hurt as a result of any fault on your part? On the other hand, have any of you ever brought a suit for personal injuries which might create a prejudice in favor of such an action in your mind? Juror: I had a suit.

"Q. Your name, please? A. C. G. Green.

"Q. And against whom was your suit? A. Street Railway Company.

"Q. And in a general way what was the nature of it, Mr. Green? A. It was a personal injury.

"Q. Were you a passenger on the car? A. Yes, sir.

"Q. (Continuing)—at the time? Was your case disposed of by trial or by settlement? A. By trial.

"Q. And was the outcome of it such that you would have any feeling at all growing out of the occurrence, either for or against the company? A. No, sir.

"Q. Could you sit on a case in which that company is involved and be a fair juror in the case? A. Yes, sir.

EXAMINATION BY MR. PREWITT:

"Q. Now, Mr. Green, I believe you said you had a suit against the company? Did have a suit? A. I had one.

"Q. How long ago, Mr. Green? A. Well, it was tried a year ago this fall some time, about a year and a half.

"Q. Who represented you, Mr. Green? A. I can't recall his name now. He is up in the Scarritt Building.

"Q. Who tried it for the street railway company? A. Conkling.

"Q. Who? A. Conkling.

"Q. Roscoe Conkling, the young man? A. Yes, sir.

"Q. Was that suit for personal injuries? A. Yes, sir.

Q. Do you have some feeling of prejudice against the company on account of the accident? A. No, sir.

"Q. (Continuing)—did you? Growing out of the suit? A. No.

"Q. Have you ever had any feeling of prejudice against the street car company? No, sir.

"Q. Do you think you could sit in this case, Mr. Green, without any feelings of bias or prejudice against the company growing out of this suit? A. Yes, sir.

"Q. Was the disposition of the suit unsatisfactory (satisfactory) to you? A. Yes, sir."

Learned counsel for defendant contend that the foregoing examination was not reported by the official court reporter, but by a substitute who inaccurately reported this question occurring therein, to-wit: "Was the

disposition of the suit *unsatisfactory* to you?" Counsel maintain that the question as asked was: "Was the disposition of the suit *satisfactory* to you?"

To this Mr. Prewitt, of counsel makes affidavit, stating that the error first came to his knowledge on June 16, 1919, the trial having been held on May 1 and 2, 1919. The trial court having made no order directing an amendment of the record, this affidavit is unavailing, for it is the settled law that on appeal to this court the bill of exceptions imports verity. [White v. Mo. Pac. Ry. Co., 178 S. W. 1. c. 84; Althoff v. Transit Co., 204 Mo. 166; State v. Johnson, 255 Mo. 281; Stegman v. Berryhill, 72 Mo. 307.]

Counsel further insist that venireman Green had "a feeling amounting to a prejudice against this defendant at the very time he was sitting on the panel in this case." In support of this insistence counsel refer to affidavits made by Messrs. Roscoe P. Conkling and Dean Davis, attorneys for defendant, filed in connection with defendant's motion for a new trial. The affidavit of Mr. Conkling, made May 9, 1919, is to the effect that about October, 1917, he represented the defendant company herein or its predecessors, in the trial of a suit brought against the Receivers of the Metropolitan Street Railway Company by Charles G. Green; that the jury in said cause returned a verdict in favor of said Green for \$1000; that affiant made several efforts to settle said judgment with Mr. Robert F. McKinstry, attorney for Green, and, after some negotiation, Mr. McKinstry stated to affiant in September, 1918, that said judgment could be settled for \$1000, which was its face value, minus interest; that some time in December, 1918, or January, 1919, affiant caused a check for \$1000 to be paid to said McKinstry in settlement of said judgment; that shortly thereafter said McKinstry notified affiant that Green was insisting that interest be paid on said judgment; that a number of times during January, February and March, 1919, said McKinstry stated to affiant that said Charles G. Green

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was very angry about the failure of defendant to pay the interest on said judgment. The affidavit of Mr. Davis, made May 7, 1919, is to the effect that on May 6, 1919, he interviewed Charles G. Green concerning a lawsuit which said Green had against defendant herein, or its predecessors, growing out of an accident on June 26, 1915, when said Green was injured boarding a car of defendant, or its predecessors; that in said conversation said Green stated that about September, 1918, he agreed to settle the judgment obtained by him in said suit for \$1000, provided said amount was paid him within a few days thereafter, but that he did not hear anything more of the settlement until about the latter part of December, 1918, when he received a check for \$500 as his part of the settlement; that said Green stated that he took the check for \$500 but protested the failure to have received interest on the \$1000, which to May 1, 1919, amounted to \$92.50, and that he was expecting that amount to be paid him by defendant, the Kansas City Railways Company; that said Charles G. Green was one of the jurymen on the panel in the case at bar.

As far as the record discloses the juror Green was not challenged by counsel for defendant on *voir dire* examination, nor was objection then offered in any manner to his competency or qualifications. The objection made first appears in the motion for new trial and cannot be considered on appeal. [City of Tarkio v. Cook, 120 Mo. l. c. 11; State v. Brewer, 109 Mo. l. c. 652; Easley v. Mo. Pac. Ry. Co., 113 Mo. l. c. 246; Grove v. City of Kansas, 75 Mo. 672.] Counsel argue, however, that defendant was caused to exercise one of its peremptory challenges in removing him from the panel, "when, if he had answered fully, accurately and truthfully all questions asked him on his *voir dire* examination, he would have been excused by the court for cause, or at least defendant would have had an opportunity to have raised an objection to him." An examination of the authorities cited by defendant show that the facts in all thereof are dis-

tinguishable from the situation here present. There the juror was either challenged for cause, had expressed a prejudice, or had participated in the verdict. Here the court below was never requested to reject the juror; there was no showing of bias or prejudice, either on his *voir dire* examination or by the affidavits filed, but on the contrary on *voir dire* he unequivocally stated several times that he was not prejudiced; and, he did not sit as a juror in the trial of the case.

Defendant urges that it was "entitled to a panel of eighteen qualified men from which the jury is to be struck." This without question is the law. But, in the instant case, there was no proof of disqualification on the part of Juror Green. And moreover, while the question is not before us, we are nevertheless of the opinion, based upon the adjudicated cases, that even though he had been challenged on the facts disclosed by the affidavits filed, such challenge should properly have been overruled. [McManama v. Railroad, 175 Mo. App. 43; Kennelly v. Kansas City Rys. Co., 214 S. W. 237; Hudson v. Railroad, 53 Mo. 525; Albert v. Terminal Railway Co., 192 Mo. App. 665; In re Bowman, 7 Mo. App. 569; Tawney v. United Railways, 262 Mo. 602; State v. Green, 229 Mo. 642.] We therefore rule the point against defendant.

II. Defendant next contends that the court erred in giving instruction numbered 1, requested by plaintiff. Said instruction is as follows:

"You are instructed by the court that under the law it was the duty of the defendant's conductor in charge of the car in question, while said car was standing at Armour Station to receive passengers, to exercise the highest degree of care to allow persons engaged in boarding said car as passengers, a reasonably sufficient length of time to safely board the same, that is, to reach a place of reasonable safety thereon, before starting said car forward, and a failure by the conductor to do this would constitute negligence on his part."

Embracing
Allegations.

"Now, therefore, if you believe and find from the evidence that at the time in question the defendant's street car in question was stopped at Armour Station to take on passengers, and that while said car was standing there (if you so find) plaintiff attempted to board said car at said station for the purpose of becoming a passenger thereon; and that before plaintiff was able to or did safely board said car (if you so find) defendant's conductor negligently (if you so find) caused said car to start forward and negligently (if you so find) closed the door of said car while said car was moving, and that as a direct result thereof the plaintiff was thrown from said car to the street below and injured and if you further find that his said injuries (if any) were directly caused by negligence on the part of the defendant's conductor as herein submitted (if you find said conductor was negligent as herein submitted) and that plaintiff was at all times in the exercise of ordinary care for his own safety, then you are instructed by the court that your verdict must be in favor of the plaintiff and against the defendant."

Defendant maintains that the gist of, or specific allegation of, negligence charged in the petition, *viz.*, "pushed plaintiff off the step" is omitted from the instruction, thereby making the same broader than the pleadings. To this we cannot give assent. The allegation mentioned is not the sole act of negligence pleaded by the petition. It also contains the allegations that the car was prematurely started forward, that the door was closed while the car was moving, and that as a result thereof plaintiff was thrown violently from the car to the street below. All of these allegations are specifically, and almost literally, covered by the instruction, under which the jury were required to find that the "conductor negligently caused said car to start forward and negligently closed the door of said car while said car was moving, and that as a direct result thereof the plaintiff was thrown from said car to the street below

and injured." Under the state of the proof adduced, when the jury were required to find that the plaintiff was "thrown from" the car, that was fairly alike in significance to requiring them to find that he was "pushed off" the car, and we do not believe they could have been misled. The criticism amounts to a distinction without a practical difference. We accordingly hold that the instruction is within the limits of the petition, and does not constitute reversible error. [Johnson v. Railway, 177 Mo. App. 298; Ottofy v. Trust Co., 196 S. W. 428; Riley v. Independence, 258 Mo. l. c. 682-684; Little v. Railroad, 139 Mo. App. l. c. 55; Quinley v. Traction Co., 180 Mo. App. l. c. 300-302; Schwanenfeldt v. Street Railway, 187 Mo. App. l. c. 592, 593.]

III. Defendant insists that the court erred in refusing to give to the jury the peremptory instruction, directing a verdict in favor of defendant, requested at

the close of all the evidence, because the physical facts as testified to show that plaintiff could not have been injured as claimed. In support of this insistence defendant argues substantially thus: That the elevated platform was fifty to fifty-five feet long and the street car about forty feet in length; that plaintiff's testimony was that while he was standing on the step of the car it started and ran twenty-four to thirty feet, when he fell; that witnesses for plaintiff testified that he fell when the car was from twenty-four to thirty feet beyond the platform; that the "back end of this car under the undisputed testimony was at least forty feet east of the west side of this elevated structure;" that if he had boarded the car when it was standing still and had ridden on it but twenty-four to thirty feet, he would have fallen at least ten feet east of the west edge of the platform; and that the only way that he could have ridden on the car while it moved twenty-four to thirty feet and then have fallen twenty-four to thirty feet west of the platform, "was for him to have boarded the moving car at the west side of

**Peremptory
Instructions.**

this elevated structure, as testified to by the six witnesses produced by the defendant." In advancing this argument defendant evidently misinterprets the testimony of some of its own witnesses when it contends that it was "undisputed" that the back end of the car "was at least forty feet east of the west side" of the platform. Witness Heinzman testified that the man running to catch the car rode about ten feet "on the platform" before he fell, which would have placed the back end about ten feet east of the west edge of the platform. Witness Wilhite said that he rode about eight or ten feet, but further says that when he undertook to grab hold of the car it had run "about twenty-five or thirty feet from the east end of the viaduct," which would have placed it about midway of the platform. Witness Shindler stated that when the car stopped to receive passengers the rear vestibule thereof was about even with the door of the shelter house, which other testimony shows was about the middle of the platform. Therefore, according to the testimony of witnesses Shindler and Wilhite, when plaintiff boarded the car the rear vestibule must have been twenty-five feet or more from the west edge of the platform; and, plaintiff having testified that he rode twenty-four to thirty feet and fell when about six feet beyond the platform, which would be substantially accurate, it cannot be said at a matter of law that it was a physical impossibility for him to have fallen as claimed. Clearly the question was one for the jury, and the demurrer to the evidence was properly overruled. [Swigart v. Lusk, 192 S. W. 1. c. 141; Hays v. Railway, 182 Mo. App. 1. c. 403; Clark v. Long, 196 S. W. 1. c. 412; Ganey v. Kansas City, 259 Mo. 1. c. 660, 661.]

IV. Defendant urges that the court erred in refusing to sustain the motion for new trial because of misconduct upon the part of plaintiff's counsel in mak-

Argument
to Jury.

ing prejudicial and improper argument to the jury, and that it further erred in failing to reprimand counsel therefor. With respect to this complaint the record shows that during the closing argument of counsel to the jury, the following occurred:

"MR. HOGSETT: The jury would never live long enough to sit on a jury in a case against the Kansas City Railways Company when that company would come in without a defense of some kind.

"MR. PREWITT: I object to that statement as outside of the record, wholly incompetent, prejudicial and improper argument, and ask that counsel be reprimanded for making such a remark.

"THE COURT: Proceed.

"To which action and ruling of the court the defendant, by counsel, then and there at the time duly excepted and still excepts.

"MR. HOGSETT: Let the remark be withdrawn, and I will substitute in place of it this, gentlemen, the same in effect, but in a different phraseology that may suit my brother: This company cannot be expected in this case to come into court and admit liability. They must make a defense, they must select from the eight witnesses to this accident, outside their train crew, the best that they can get, who will tell a story favorable to them."

As to the propriety and effect of the statement made by counsel for plaintiff, the trial judge, who heard the remarks of opposing counsel, was in a better position to determine than are we, and he evidently did not consider the same prejudicial. Nor, from what is before us, are we of the opinion that he was guilty of an abuse of discretion in failing to reprimand counsel. In our judgment, based upon the fragment of the speech quoted, the remark made was not sufficient to have influenced the jury in arriving at their verdict. Furthermore, when counsel for defendant objected to the ar-

gument, the remark was at once withdrawn by counsel who made it, and, without objection, another statement was substituted in lieu thereof. If there was any transgression we are constrained to hold that it was cured by such withdrawal. [Grace v. Railway, 212 S. W. 1. c. 42; Griggs v. K. C. Rys. Co., 228 S. W. 1. c. 513; Sinclair v. Telephone Co., 195 S. W. (Mo. App.) 558; Hollenbeck v. Railway, 141 Mo. 1. c. 107; Nance v. Sexton, 203 S. W. (Mo. App.) 649; 38 Cyc. 1502.]

V. Defendant next claims that the court erred "in refusing to sustain the motion for a new trial on the grounds that the verdict and judgment are contrary to the greater weight of the evidence and because the jury in arriving at their verdict wholly disregarded the instructions given by the court." In support of the first half of this contention defendant argues that where the verdict is against the weight of testimony to such an extent that it raises "a presumption of prejudice, corruption, or gross negligence on the part of the jury," the appellate court has the right to interfere with the same. Aside possibly from the excessiveness of the verdict, which we will discuss *infra*, the record in this case is wholly devoid of anything which could give rise to a logical assumption, much less a presumption, that the jury was prejudiced, or corrupt, or grossly negligent. Defendant stresses the fact that the three eye-witnesses for plaintiff all testify to the same facts and that opposed to that testimony defendant has "the positive testimony of six witnesses." The rule that the weight of testimony is not to be determined by the mere number of witnesses has been so firmly established in our system of jurisprudence that it is useless to cite authority in support thereof. And, as none of the witnesses for defendant, with the possible exception of the conductor, identified plaintiff as the man they saw running after the car, the pro-

Greater
Weight of
Evidence.

bative value of their testimony is not necessarily greater than that of the witnesses for plaintiff.

The verdict for plaintiff was unanimous. The trial court overruled defendant's motion for new trial, in which it was urged that the verdict was against the greater weight of the evidence. Thereafter defendant filed another motion to set aside the order overruling its motion for new trial, in which it was again urged that the verdict was contrary to the greater weight of the evidence, which motion was also overruled. The trial court has thus passed twice upon that question. And, there being substantial testimony to support the verdict, it is not for this court to weigh the evidence or usurp the power of the jury and substitute its judgment for that of the jury. [Linderman v. Carmin, 255 Mo. l. c. 71; Norrjs v. Railroad, 239 Mo. 695; Vincent v. Means, 207 Mo. 709.] The defendant having failed to point out any respect in which the jury "disregarded the instructions given by the court" we shall not discuss that question.

VI. Defendant's final contention is that the verdict is excessive.

With respect to the nature and extent of plaintiff's injuries and loss of earning power, his testimony showed the following: That he sustained a broken jaw, five or six teeth knocked out, a broken chest, and his legs were hurt; that as a result of his injuries he had been unable to do any work for more than two years, that his chest pained him, his legs ached, and when "I bend over my head begins to roar and gets dizzy;" that one side of his jaw was higher than the other; that not until about August or September, 1918, was he again able to work and he then secured employment at Morris & Company, putting sacks on beef, but could only work "a day or two and have to rest a day."

Dr. H. L. Regier, police surgeon of Kansas City, Kansas, a witness for plaintiff, testified that he saw

Excessive
Verdict.

plaintiff the night of the accident at St. Margaret's Hospital, Kansas City, Kansas; that he was unconscious, bleeding from the ear, had a broken lower jaw, some teeth knocked out, and was bloody; that "I took for granted, while I wasn't quite sure, on account of him bleeding from the ear, that he must have had a fracture of the base of the skull;" that the principal thing witness did was to wire his lower jaw; that he "didn't entertain the idea" that plaintiff was under the influence of liquor. Witness stated that he did not remember having told Claim Agent Frank Wisdom that he found plaintiff under the influence of liquor.

Dr. C. E. Saunders, physician and surgeon, a witness called by plaintiff, testified that he first attended plaintiff at St. Mary's Hospital, Kansas City, Missouri, three days after the accident; that plaintiff was then under his care "continuously up until about the 4th or 5th day of May; I saw him every day, and then after that he came to the office about every second or third day until the middle of June, and then I have seen him up to the time I went into the service (July, 1918) on an average of about once a month;" that plaintiff had a compound fracture of the lower left jaw, a fracture at the base of the skull, several teeth loosened, with three or four knocked out, and numerous bruises; that he had hemorrhage from the ears and from the nostrils, dilated or irregular pupils, a tooth driven into the bone of the lower jaw, and a little piece of bone broken off the upper jaw; that infection set in in the jaw; that the condition of the fracture of the skull was "always very serious and the outcome questionable, and in Julius's case I figured he had a 50-50 chance;" that they wired plaintiff's lower jaw to the upper jaw and fed him through a tube, through an opening in the front teeth, for four or five weeks. The witness further stated that about a week before the trial he had examined plaintiff and found that the union of the bone of the jaw was not in perfect apposition, "one fragment is a little higher than the other fragment, which throws his teeth

out of line," one side being between an eighth and a quarter of an inch below the other and the two not touching; that he "has a discharging abscess from the gum, . . . quite a little infection around a good many of his teeth, . . . is extremely nervous, has exaggerated reflexes, the patella reflexes, which shows an extreme irritability of the cerebro-spinal canal, that is, the spinal cord; his symptoms are nervous complaints, or dizziness, headiness, and headache occasionally;" that "in stooping he seems to lose control of equilibrium to some extent." Asked to explain this latter, the witness said: "When you get a fracture of the base of the skull, or the fracture of any bone, you get a union of the bone, you get a deposit of the bone or bony tissue at the line of union. Part of that could be explained by the increased pressure from this deposit, and then the fact that he had a hemorrhage at the ear would indicate that this fracture at the base of the skull extended into what is known as the semi-circular canals which are located near the middle ear, and in these canals are nerve substances that have to do with equilibrium." Asked if this condition in plaintiff was permanent, the witness replied, "Yes, sir." Over the objection of counsel for defendant, in response to a question as to whether or not plaintiff could do "manual labor requiring that he stoop over," witness replied, "No; he can't do that kind of work; it would be dangerous." Being further examined, without objection by defendant, witness testified:

"Q. Explain why not, Doctor? A. Well, if he was working, he couldn't do that kind of work, especially if he had to work off the ground or around machinery, for fear of falling into machinery or falling from any scaffold that he might be working upon." Witness stated that the amount of his bill was \$185.

Defendant offered no evidence with respect to the injuries sustained by plaintiff or relative to impairment of his earning power.

From the evidence it may fairly be deduced that plaintiff suffered severe pain, that the usefulness of his teeth has been seriously impaired and that there is more or less permanent impairment of his capacity for manual labor. However, when measured by the standards applied by this court in numerous cases, the verdict seems to us to be excessive. Prior to the accident plaintiff was earning, at \$11 per week, \$572 per annum. During the two and one-half years subsequent to his injury when he claims to have been unable to work, he would have earned \$1430. The charge which he sustained for surgical and medical attention was \$185, making a total loss to him, independent of pain and suffering, of \$1615—\$11,000, less the \$1615 loss suffered, would leave \$9385. This amount, invested at six per cent, would produce an annuity of \$563, or within \$9 of his total normal earning capacity.

Accordingly, if plaintiff will, within the next ten days, remit the sum of \$4,000, so as to reduce the judgment to \$11,000, the same will be affirmed as of the date thereof; otherwise, the judgment will be reversed and the cause remanded for a new trial. All concur.

ELIZABETH (GOODRICH) VAN ZANT v. KANSAS CITY SOUTHERN RAILWAY COMPANY, Appellant.

Division One, July 11, 1921.

1. **NEGLIGENCE: Injury to Interstate Passenger: Free Pass: Stipulated Exemption.** The United States courts, in the trial in them of causes governed solely by the common law, follow their under-

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standing of the common law, regardless of the decisions of the courts of the State in which the cause of action arose; and they have uniformly held that under the common law, irrespective of any act of Congress regulating interstate commerce, stipulations in an interstate free pass exempting a carrier from liability for personal injury to the passenger negligently inflicted, are enforceable. But under the law of this State an attempt by a common carrier, by a stipulation annexed to a free pass, to relieve itself of the consequences of its negligence, is ineffective; and where the passenger was riding on a free pass containing such a stipulation, in an interstate journey, her case, if instituted in this State, is to be determined according to the applicable local state law, unless that law has been superseded by some act of Congress regulating interstate commerce, and it has not been so superseded.

2. ———: ———: ———: ———: **Hepburn Act: Anti-Pass Regulation: Member of Family.** The Hepburn Act, fixing a penalty against a common carrier which issues an interstate free pass, "except to employees and their families," and a like penalty against any person who uses such pass, did not attempt to cover the field of damages for personal injuries negligently inflicted by the carrier upon a person riding on said pass, but the sole purpose of that part of the act was to prohibit the issuance of free transportation by interstate carriers. It did not prohibit the issuance of an interstate free pass obtained by a railroad employee for his mother, a member of his family, nor prevent her from recovering damages for personal injuries received by her, in this State, while riding, in an interstate journey, on said pass.
3. ———: ———: ———: ———: ———: **Carmack Amendment.** Neither the Hepburn Act nor the Carmack Amendment thereto superseded the law of this State that a stipulation attached to an interstate free pass will not relieve the carrier from damages for personal injuries, negligently inflicted in this State, upon the person using such free pass, in a suit brought in the courts of this State. The Carmack Amendment dealt with the carriage of property only.

Appeal from Jasper Circuit Court.—*Hon. Grant Emerson*, Judge.

AFFIRMED.

Cyrus Crane and Ray Bond for appellant.

(1) The question for decision is whether or not the stipulations on a free interstate pass are binding and enforceable and relieve defendant from liability. Such stipulations are controlled by Federal and not State law. *Donovan v. Wells-Fargo*, 265 Mo. 229; *Bilby v. Ry. Co.*, 199 S. W. 1004; *Holloway v. Railroad*, 276 Mo. 500. (2) In the particular instance the Federal legislation is sufficient to put the matter under the operation of Federal law to the exclusion of State law. *Leftridge v. Tel. Co.*, 277 Mo. 90, 97; *Tel. Co. v. Lumber Co.*, 251 U. S. 27; *Tel. Co. v. Boegli*, 251 U. S. 315; *Pryor v. Williams* (recently decided by U. S. Supreme Court). (3) Under the decisions of the Supreme Court of the United States, the non-liability stipulations of the pass are binding and enforceable and constitute a complete defense. *Charleston Ry. Co. v. Thompson*, 234 U. S. 576; *N. Pac. Ry. Co. v. Adams*, 192 U. S. 440; *Boering v. Chesapeake Ry. Co.*, 193 U. S. 442. Federal cases distinguished are: *Norfolk Railroad Co. v. Chatman*, 244 U. S. 276; *Pac. Ry. Co. v. Schuyler*, 227 U. S. 601.

F. H. Lee, Kenney & Kenney, Norman Cox and Hugh Dabbs for respondent.

(1) It is conceded by appellant, for the purposes of this appeal, that the stipulation on the back of the pass in this case, as to the assumption of risk, is void under the laws of Missouri, where the injury occurred, and under the laws of Kansas, where the pass was issued. (2) The question of the validity of such a contract exempting from liability, and of the liability of a carrier for negligent injury to a person riding on a free pass, is not covered by nor within the matters regulated by the Hepburn Act relating to free passes and the issuing and us-

ing thereof. These questions constitute no part of the field covered by that act, nor was the regulation, control or enforcement of such liability taken over or dealt with by Congress by such enactment. In passing on such a question, even where the case is tried in the Federal court, that court does not determine the question of liability or non-liability by any provisions of the Hepburn Act, but by its own interpretation of the common law. *Southern Pac. Co. v. Schuyler*, 227 U. S. 610, 612; *Weir v. Roundtree*, 173 Fed. 779; *Smith v. Ry. Co.*, 194 Fed. 81; *Martin v. Pittsburgh Ry. Co.*, 203 U. S. 284; U. S. Comp. Sts. 1916 Anno., sec. 8563 (5), p. 9069; *Wiley v. Grand Trunk Railroad*, 227 Fed. 129; *Beutler v. Grand Trunk Railroad*, 224 U. S. 85; *Clark v. Southern Ry. Co.*, 119 N. E. 539. Cases cited by analogy: Telegraph cases cited by appellant; *Adams Exp. Co. v. Croninger*, 226 U. S. 488, 504; *Southern Pac. Ry. v. Jensen*, 244 U. S. 244. (3) As to the instant case, under the decisions, federal legislation as to the carriers of passengers on a pass has not occupied the field of liability for injury to such a passenger. No attempt has been made to regulate or control this liability, and no mention made thereof. The same is true of contracts designed to exempt the carrier from such liability. The State court, or local forum is therefore left free to apply its local laws as to such liability. *Southern Pac. Ry. Co. v. Schuyler*, 227 U. S. 610-612; *Clark v. Southern Ry. Co.*, 119 N. E. 539; *Weir v. Roundtree*, 173 Fed. 779; *Smith v. A. T. & S. F. Co.*, 194 Fed. 81; *Southern Pac. Ry. v. Jensen*, 244 U. S. 244; *Wiley v. Grand Trunk Ry.*, 227 Fed. 129. For illustration of the point by analogy and distinction of cases, see other cases cited under Point 2, and *Fowler v. Railroad*, 229 Fed. 375. The cases cited by appellant under its corresponding point are all cases dealing with the question of rates charged by telegraph companies, a subject which has been wholly taken over by Congress by express enactment. (4) Under the decisions of the United States

supreme court and the Federal courts a distinction is made as to what law is applicable in determining the question of the validity of a contract of assumption of risk in connection with a free pass, depending on the forum in which the case was tried. The courts uniformly hold that where, as here, the stipulation on the back of the pass is void under the local law where the injury occurred, and where the case is tried in the State court and comes to the Federal court on writ of error, the State or local law as to liability will prevail, and be enforced by the Federal court on the review, whereas, if the case be tried in the Federal court, either by being brought there originally or transferred thereto by the process of removal, the Federal court will apply its own interpretation of the common law as to the liability. Williams, *Jurisdiction & Practice in Federal Courts*, p. 193, par. 4; *Southern Pac. Ry. v. Schuyler*, 227 U. S. 610; *Weir v. Roundtree*, 173 Fed. 779; *Smith v. A. T. & S. F. Ry.*, 194 Fed. 81; *Fowler v. Railroad*, 229 Fed. 374; *Tweeten v. Railroad*, 210 Fed. 830; *Charleston Ry. Co. v. Thompson*, 234 U. S. 576.

RAGLAND, C.—Action for personal injury. Plaintiff was a member of the family of her son, John Goodrich, who resided at Pittsburg, Kansas. The latter was an employee of the defendant, and on August 4, 1917, he obtained from his employer for his mother a free pass over defendant's railroad from Pittsburg, to Howe, Oklahoma. On August 9, 1917, while riding on this pass, on one of defendant's passenger trains, *enroute* from Pittsburg, Kansas, to Howe, Oklahoma, and while passing through Newton County, Missouri, plaintiff was seriously injured through the negligent management and handling of the train by defendant's employees. On the back of the pass this condition was printed: "This pass is not transferable, must be signed in ink by the holder thereof, and the person accepting and using it thereby

assumes all risk of accident and damage to person and baggage."

The case was tried without a jury. The defendant asked the court to declare as a matter of law that the stipulation on the back of the pass was valid and binding, and that by reason thereof plaintiff was not entitled to recover. This declaration was refused; the court found for the plaintiff and assessed her damages at \$8,000, the sum that had been stipulated in advance to be so assessed, in the event the finding was for the plaintiff. From the judgment rendered in accordance with the finding and assessment of damages defendant appeals.

It seems to be conceded by appellant that under the law of this State, as declared by its courts, a person travelling on a free pass granted him by the carrier is a passenger and not a trespasser or mere licensee; that such person is entitled to the same degree of care as any other passenger, and may hold the carrier liable for injuries resulting from its negligence or that of its servants; and that a condition annexed to his pass attempting to relieve the carrier of the consequences of its negligence is ineffective because against public policy. [Bryan v. Railway, 32 Mo. App. 228; Huckstep v. Railway, 166 Mo. App. 330; Young v. Railway, 93 Mo. App. 267; Lemon v. Chanslor, 68 Mo. 340; Sherman v. Railroad, 72 Mo. 62; Padgitt v. Moll, 159 Mo. 143; Powell v. Railroad, 255 Mo. 420.]

Appellant contends, however, that, as plaintiff was travelling from one State to another on an interstate free pass, issued, as it alleges, in accordance with the provisions of the Hepburn Act (U. S. Comp. Stats. 1916, p. 9069, sec. 8653, sub-div. 5), the rule of decision, with respect to the validity of stipulations in such passes exonerating the carrier from liability for negligence, followed by the United States Courts, and not that followed by the courts of this State, should be applied in determining the question of defendant's liability.

In the trial of causes governed solely by common

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law in the United States courts, those courts follow their own understanding of the common law, regardless of the decisions of the courts of the State in which the cause of action arose. [Beutler v. Railroad, 224 U. S. 85; Fowler v. Railroad, 229 Fed. 374.] And the former courts have always held that under the common law, irrespective of any act of Congress regulating interstate commerce, stipulations in a free pass exempting a carrier from liability for negligence are valid and enforceable. [Northern Pacific Railroad Co. v. Adams, 192 U. S. 440; Boering v. Railroad, 193 U. S. 442; Wiley v. Railroad, 227 Fed. 129.] The instant case, however, having been instituted in a state court of this State, on a cause of action which accrued in this State, and having been tried in such state court, is to be determined in accordance with our applicable local state law, unless that law has been superseded by some act of Congress in the regulation of interstate commerce. [Adams Express Co. v. Croninger, 226 U. S. 491.]

“Railroad corporations, like all other corporations and persons, doing business within the territorial jurisdiction of a State, are subject to its law. It is in the law of the State, that provisions are to be found concerning the rights and duties of common carriers of persons or of goods, and the measures by which injuries resulting from their failure to perform their obligations may be prevented or redressed. Persons travelling on interstate trains are as much entitled, while within a State, to the protection of that State, as those who travel on domestic trains. A carrier exercising his calling within a particular State, although engaged in the business of interstate commerce, is answerable, according to the law of the State, for acts of non-feasance or of misfeasance committed within its limits. If he fails to deliver goods to the proper consignee at the right time and place, or if by negligence in transportation he inflicts injury upon the person of a passenger brought from another State, the right of action for the consequent damage is given by

the local law." [Chicago, Milwaukee & St. Paul Railway Co. v. Solan, 169 U. S. 133, 137, 138.]

It is claimed by appellant that all state laws on the subject of interstate free passes, including those relating to personal injuries negligently inflicted by the carrier upon persons while being carried on such passes, were superseded, or annulled, by the Act of Congress of June 29, 1906, known as the Hepburn Act. That act provides: "No common carrier subject to the provisions of this act, shall, after January first, nineteen hundred and seven, directly or indirectly, issue or give any interstate free ticket, free pass, or free transportation for passengers, except to its employees and their families.

. . . Any common carrier violating this provision shall be deemed guilty of a misdemeanor and for each offense, on conviction, shall pay to the United States a penalty of not less than one hundred dollars nor more than two thousand dollars, and any person, other than the persons excepted in this provision, who uses any such interstate free ticket, free pass, or free transportation shall be subject to a like penalty."

Whether the provisions just quoted of the Hepburn Act have the effect contended for must be determined in accordance with the rule announced from time to time by the Supreme Court, in slightly varying phraseology, to this effect:

"When the question is whether a Federal act overrides a State law, the entire scheme of the statute must of course be considered and that which needs must be implied is of no less force than that which is expressed. If the purpose of the act cannot otherwise be accomplished—if its operation within its chosen field else must be frustrated and its provisions be refused their natural effect—the State law must yield to the regulation of Congress within the sphere of its delegated power. But the intent to supersede the exercise by the State of its police power as to matters not covered by the Federal

legislation is not to be inferred from the mere fact that Congress has seen fit to circumscribe its regulation and to occupy a limited field. In other words, such intent is not to be implied unless the act of Congress fairly interpreted is in actual conflict with the law of the State." [Savage v. Jones, 225 U. S. 501, 533.]

The rule has been more tersely stated in this language: "To have the effect of superseding a State law, it is not sufficient that a Congressional regulation of commerce invades the same field; it must expressly cover the precise subject-matter, or show a purpose to take legislative possession of the whole field." [12 C. J. 18.]

The plain and obvious import of that part of the Hepburn Act under consideration is to prohibit the issuance by an interstate carrier of interstate free passes to any persons, except those of certain designated classes, and to subject both the carrier issuing such a pass and the person using it, in violation of its prohibition, to certain penalties. With respect to the issuance of passes to persons coming within the exception, nothing is said; there is no reference whatever to the form or provisions of any such pass, or to the undertaking thereby assumed by the carrier issuing it; or to the liability, if any, that may be incurred in the transportation thereunder, for a failure on the part of the carrier to exercise care, or otherwise. As evidenced by the language, the sole purpose of the enactment of these provisions was to prohibit the issuance of free transportation by interstate carriers. However, the issuance to certain classes of persons was excepted from the operation of the act. So far as the cases coming within the exception were concerned the law remained unchanged. After the passage of the act, as to the persons named in the exception, the carrier could issue free interstate passes, on such conditions, and under such stipulations, as it saw fit; or it could refuse to issue them at all, just as it could,

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and did do, prior thereto. The only regulation of interstate free passes undertaken by the act was to *prohibit their issuance and use*—except with respect to the persons specifically excluded from its operation.

It is obvious, that if Congress, by the Hepburn Act, has assumed the regulation of the duties (and the liability arising from their breach) pertaining to the transportation of persons under interstate free passes, in cases which are in terms excluded from the operation of the anti-pass provision of the act, it must be because the act as a whole, in its general scope and purpose, indicates that Congress has chosen to occupy the entire field of liability incident to the carriage of interstate passengers. What duty, if any, a carrier owes a gratuitous passenger is but a phase of the larger question of what duty it owes to passengers generally.

The objects sought to be attained by the original Interstate Commerce Act of 1887 (24 U. S. Statutes at Large, p. 279, c. 104) was to secure continuous carriage, and just and uniform rates, and to compel the furnishing of equal facilities. It contained no provision touching liability for negligence on the part of the carrier in carrying either persons or property. [Pennsylvania Railroad Co. v. Hughes, 191 U. S. 477, 487, 488.] The first legislation by Congress with respect to such liability was the Carmack Amendment to the Hepburn Act (34 U. S. Stats. at Large, 584, 585, c. 3591), and that dealt with the carriage of property only. [Adams Exp. Co. v. Croninger, supra.] The act will be searched in vain for a correlative provision relating to the carriage of persons. The anti-pass provision of the act was merely in furtherance of the purpose of the original Interstate Commerce Act to secure equality and prevent unjust discrimination.

Whether responsibility for personal injuries sustained by interstate passengers is still subject to the regulations of the several States does not seem to have even been directly passed upon by the Supreme Court,

but in *Southern Pacific Co. v. Schuyler*, 227 U. S. 601, 612, it held that the anti-pass provision of the Hepburn Act does not deprive a party who accepts gratuitous carriage in interstate commerce, in actual but unintentional violation of the prohibition of the act, of the benefit and protection of the law of the State imposing upon the carrier a duty to care for his safety.

The Supreme Court of Indiana, in passing upon the precise question under consideration here, held that the Hepburn Act and the Carmack Amendment thereto do not attempt to regulate liabilities of carriers of persons on valid free passes, and that such liabilities continue subject to state statutes. [*Clark v. Railway*, 119 N. E. 539.]

Our own conclusion is that Congress has not legislated on the subject of the rights and liabilities of the parties in cases of the interstate carriage of passengers under free passes, not coming within the prohibition of the Hepburn Act, or respecting the validity of stipulations or conditions annexed to such passes exempting the carrier from liability and that, therefore, these matters remain the subject of regulation by the several States.

In accordance with the views herein expressed, the judgment *nisi* should be affirmed. It is so ordered. *Small, C.*, concurs; *Brown, C.*, absent.

PER CURIAM:—The foregoing opinion of RAGLAND, C., is adopted as the opinion of the court. All of the judges concur.

G. A. SIDWELL and AUGUST SANDERS v. NATHAN L. KASTER and LEE KASTER, Appellants—No. 21,851.

G. A. SIDWELL and AUGUST SANDERS, Appellants, v. NATHAN L. KASTER and LEE KASTER—No. 21,850.

Division One, July 11, 1921.

1. **DEED OF TRUST: Suit to Foreclosure: Trustee as Party.** To a suit brought against the guardian and curator to foreclose a deed of trust executed by an insane person, the trustee is not a necessary party, and a failure to make him a party in no manner affects the validity of the sale.
2. ———: ———: **Wife as Party: Waiver.** If the divorced wife of the insane mortgagor was a necessary party to a proceeding brought against his guardian and curator to foreclose a deed of trust, the defendant should by answer or demurrer have raised the point that she was a necessary party, and having failed to do so waived the defect.
3. **FORECLOSURE SALE: Conspiracy Not to Bid: Inadequacy of Price.** In a suit to quiet title, brought by the purchaser at a sheriff's sale of land worth \$100 to \$125 per acre, and another who had purchased after the sale and paid a part of the purchase price, against the mortgagor who claims the foreclosure proceeding was void, it will not be held that there was a conspiracy between the purchaser at the sheriff's sale and the person to whom he subsequently sold that the buyer would not bid at said sale, there being no evidence that he would have bid or intended to bid had there been no agreement to buy, and there being evidence that he could not get a clear title because of the outstanding dower of the judgment debtor's wife, who by his fault had not been impleaded with him in the foreclosure proceeding. Nor under such circumstances will it be held that the price of \$68.75 per acre paid at the sheriff's sale was inadequate, the wife's dower not being included.
4. **CAUSE OF ACTION: Jurisdiction.** The mere failure of a petition to state a cause of action does not deprive the court of jurisdiction.

5. **JURISDICTION: Suit Against Insane Person.** The probate court does not have exclusive jurisdiction of suits against insane persons; the circuit court also has jurisdiction of suits founded on claims against an insane person, whether they arose before or during guardianship. [Disapproving *Johnson v. Kaster*, 199 Mo. App. 501.]
6. ———: **Judgment Against Guardian: Suit Against Restored Ward: Collateral Attack.** Where judgment has been obtained in the probate court against the guardian of an insane person, and before payment such person is adjudged restored to his right mind, the creditor may bring suit in the circuit court against such restored person for the amount of his claim and obtain judgment against him; for by the express words of the statute where an insane person is adjudged restored to his right mind, the administration upon his estate in the probate court immediately ends, and the jurisdiction of that court over him and his estate is terminated, and he is subject to suit on any valid claim the same as any other person. And the fact that the petition for judgment in the circuit court recited an allowance by the probate court against his guardian on the same claim while he was yet insane, and asked for judgment for the amount of the allowance with interest from its date, alleging that said allowance constituted an indebtedness of the defendant, did not deprive the circuit court of jurisdiction of the suit, or render the judgment invalid, for whether the facts stated constituted a cause of action was a question for the circuit court to decide, and in a collateral proceeding that question is immaterial and the ruling at most erroneous, for the failure of a petition to state a cause of action does not affect jurisdiction. And in a suit by a purchaser under said judgment to quiet title brought against the defendant therein, said judgment cannot be held to be invalid on the theory that the allowance in the probate court was a judgment *in rem* against the defendant's estate and the judgment in the circuit court was one *in personam* against him personally. [Disapproving *Johnson v. Kaster*, 199 Mo. App. 501.]
7. **APPEAL FROM ERRONEOUS JUDGMENT: No Supersedeas: Execution: Title of Purchaser.** Where the judgment of the circuit court in an action for debt was for plaintiff and was not void, but only erroneous, and on writ of error without a *supersedeas* staying execution was reversed, but before said writ issued execution was issued and levied on defendant's land, the purchaser at such sale, if a stranger to the proceeding, takes the title, which is in no way impaired by such reversal.

Appeal from Schuyler Circuit Court.—*Hon. N. M. Pettigill*, Judge.

AFFIRMED (*in part*); REVERSED (*in part*).

Higbee & Mills, Rolston & Rolston and Campbell & Ellison for appellant in No. 21850.

(1) A circuit court is a court of general jurisdiction and has exclusive original jurisdiction in all civil cases not otherwise provided for. Art. 6, sec. 32, Mo. Constitution. (2) A judgment rendered by a court having jurisdiction of the subject-matter, from which no appeal has been taken, is binding and conclusive and cannot be impeached for any defect in pleading or proof. In a suit upon such a judgment the sufficiency of the petition on which it is rendered cannot be inquired into. *Holt Co. v. Cannon*, 114 Mo. 514. A judgment cannot be collaterally attacked for want of jurisdiction because the petition does not state a cause of action, since, if it states a case belonging to the general class over which the authority of the court extends, jurisdiction is conferred. *Winningham v. Trueblood*, 149 Mo. 572; *Cole v. Parker*, 207 S. W. 766. (3) When a party to an action, being fully apprised of his rights, suffers judgment to go against him when he might, by the exercise of reasonable diligence in making his defense, prevent a recovery, he should not be allowed in any subsequent proceedings to reargue questions which either were, or else could have been, adjudicated at the trial. *Smith v. Kiene*, 231 Mo. 233. (4) The Fogle judgment is not void, and is therefore not subject to collateral attack. Authorities under Point 2; *Potter v. Whitten*, 161 Mo. App. 127; *McQuillin's Mo. Practise*, sec. 911. (5) Defendants' answer does not tender an issue. The allegation that the execution

sale under the Fogle judgment is void is a mere conclusion.

J. H. Whitecotton, A. D. Morris, J. W. Joyne and Lozier & Morris for respondents in No. 21850.

'The Fogle judgment is absolutely void because the Schuyler Circuit Court had no jurisdiction over the subject-matter of the action and the whole record so shows, and it may be attacked collaterally. *Fogle v. Kaster*, 212 S. W. (Mo. App.) 565; *Johnson v. Kaster*, 199 Mo. App. 501; *Brown v. Chadwick*, 79 Mo. 587; *Moody v. Peyton*, 135 Mo. 491; *Black v. Black*, 34 Pa. St. 354; *Chandler v. Dodson*, 52 Mo. 130; Art. 6, sec. 34, Mo. Constitution; Sec. 4056, R. S. 1909; 23 Cyc. 1059, 1060, 1073, 1074, and 1087; 17 Cyc. 1307-8; Works on "Courts and Their Jurisdiction," sec. 26, p. 169; *Smith v. Black*, 231 Mo. 691; *Draper v. Bryson*, 17 Mo. 83; *Heard v. Sack*, 81 Mo. 616; *Turner v. Edmonston*, 210 Mo. 428; 15 R. C. L. p. 895, sec. 374; 10 R. C. L. p. 1335, sec. 128; *Railroad v. Lowder*, 138 Mo. 538; *Russell v. Grant*, 122 Mo. 180; *Adams v. Cowles*, 95 Mo. 507.

John T. Morris, A. D. Morris, J. W. Joyne and J. H. Whitecotton for appellant in No. 21851.

(1) The court under the pleadings and statute had the right to "accord full and complete relief, whether legal or equitable," to all the parties and to each of them as fully as the court could do in any proceeding that could have been brought by any of the parties. Sec. 253, R. S. 1919; *Ball v. Woolfolk*, 175 Mo. 285; *Huff v. Land Co.*, 157 Mo. 65; *Titus v. Dev. Co.*, 268 Mo. 239; *Talbert v. Grist*, 108 Mo. App. 499; *Powell v. Crow*, 204 Mo. 481.

(2) Where there is inadequacy of price coupled with evidence of unfairness or fraud an execution sale should

be set aside. *Walker v. Mills*, 210 Mo. 690; *Ayers v. Blair*, 26 W. Va. 558; 17 Cyc. 1278; *Roer on Judicial Sales* (2 Ed.), p. 406, sec. 1087. (3) A bill in equity to set aside an execution sale when the grounds upon which the sale is sought to be set aside are not apparent from an inspection of the proceedings as in this case, will be sustained. 17 Cyc. 1282; *Abbey v. Dewey*, 25 Pa. St. 416; *Philips v. Benson*, 161 Pa. St. 421; *Underwood v. McOugh*, 23 Grat. (Va.) 427. (4) The law will not tolerate any influence likely to prevent competition at a judicial sale, and it accords to every debtor the right and opportunity to a fair sale and to get a full price for his property. *Cocks v. Izard*, 7 Wall. (U. S.) 559; *Underwood v. McVeigh*, 23 Gratt. (Va.) 428. (5) The court in an equity suit on appeal will consider all the testimony and direct such judgment as the conscience of the court will approve disregarding the findings and judgment of the trial court below.

Campbell & Ellison, Higbee & Mills and Rolston & Rolston for respondents in No. 21851.

(1) There is no defect of parties. Sec. 1970, R. S. 1919; *Utter v. Sidman*, 170 Mo. 284. (2) The defense is a collateral attack and cannot be maintained. *Lieber v. Lieber*, 239 Mo. 1. (3) Appellant by answer seeks to retain the fruits of the sale while in argument alone does he, by his attorneys, offer rescission. To rescind would be a condition precedent. *Delpine v. Lume*, 145 Mo. App. 549; *Corby v. Bean*, 44 Mo. 379. (4) The offer by attorney in argument cannot broaden the issues by the pleadings and is not binding on appellant. The judgment asked by appellant in the pleadings is cancellation of the note and the deed. *Davidson v. Davidson*, 249 Mo. 474. (5) A sale under execution, pending appeal where no appeal bond is given, is valid. Sec. 1473, R. S. 1919; *Burgess*

v. O'Donoghue, 90 Mo. 302. (6) Availing one's self of a legal right "such as proceeding to collect a valid judgment," is not fraudulent. Nations v. Pulse, 175 Mo. 94. (7) Appellant's answer concedes Sanders' title. Appellant, therefore, has no interest in the result of this case.

SMALL, C.—Appeal from Circuit Court of Schuyler County.

Suit to quiet title to one-hundred and sixty acres of land, and also forty acres of land adjoining thereto, in Section 2, Township 64, Range 15, in said county.

The petition avers: That in February, 1918, the plaintiff Sanders became the owner in fee of said lands, and afterwards and on the same day entered into a contract to sell and convey said lands to his co-plaintiff. That his co-plaintiff has paid part of the purchase price, and a part of said purchase price is unpaid, and the deed has not yet been executed. That there is an agreement between said plaintiffs that, upon payment of said purchase money, deed will be executed. That defendants claim some right or interest in said lands, and that they are entitled to the possession thereof, but that they have no such right nor interest. Plaintiffs pray that the respective titles be defined and adjudged, together with the right of possession thereof.

The answer, besides a general denial, sets up that the plaintiffs claimed the one-hundred and sixty acres under an execution sale in foreclosure proceedings against defendant Nathan L. Kaster, which defendants say should be set aside, because of inadequacy of price paid by the plaintiff Sanders, brought about by reason of a conspiracy between the plaintiffs and others to prevent bidding at such sale, and by plaintiff Sanders purposely failing to make the trustee in the deed of trust, and the wife of said Kaster, parties to such foreclosure. That the plaintiffs claim title to the forty acres under

an execution sale in the case of Fogle against the defendant, Nathan L. Kaster, which execution sale was absolutely void, because the court rendering the judgment had no jurisdiction, and that it was also void for inadequacy of price, and conspiracy between the plaintiffs and others to suppress bidding. Other minor matters affecting such sale are also alleged, which will be noticed in the opinion. The sales of both tracts were made on the same day, February 11, 1918.

The reply put the matters alleged in the answer in issue.

Plaintiff Sanders testified in substance as follows: That both the forty-acre and one hundred and sixty-acre tracts were sold by the sheriff on the same day, February 11, 1918, while the same assemblage of bidders was present. Witness did not recollect that anyone made the statement at the sale, that there would be a defect in the title. He talked about selling to plaintiff Sidwell the same day he bought it. Had no previous agreement with him. Talked over prices. If he bought it, there was no price set. Sidwell was at the sale. Does not know why Sidwell did not bid. Does not remember whether he said he would give title to it.

"Q. Sidwell stood at your side while you bid, and as soon as it was knocked off to you you went over to an office here in Lancaster?—A. Yes, sir, I sold it. I didn't see him right there when I bid it in. Don't remember whether we walked away together.

"Q. You know the reason Sidwell didn't bid? A. They just sold Kaster's interest. I understood I wasn't getting good title to a part.

"Q. You understood there was an outstanding title? A. I don't understand.

"BY MR. CAMPBELL: Nathan Kaster had been married and his wife had secured a divorce? A. The way I understood it, they sold Nate Kaster's interest in that land, and that is what I bought. My daughter, Nate

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Kaster's former wife, wasn't present at the sale. There was no arrangement before the sale between me and my daughter and Sidwell as to the matter of the purchase and any dower or interest she might have. Don't remember of any talk between Sidwell and myself about my daughter's title. She had not agreed with either of us to join in conveying the land to Sidwell, if I purchased it. Attorney Rolston prepared the contract with Sidwell. Don't remember anything about talking with him before the sale. Rolston was not my lawyer, he was representing Sidwell. I don't know what the land value really was. I was the only bidder.

"Q. At the time you bid, you didn't know what it was worth—\$5 or \$50? A. Or a hundred."

D. Z. Branziger testified for defendants: Was present at the sale. Sanders and Sidwell were standing together at the time of the sale. About a week before the sale, Sidwell told me that he had been to see Sanders and had made arrangements with Sanders to buy it. He said the sheriff was selling all the right that Kaster had in his land. The land was then reasonably worth \$100 per acre. It is now worth \$125 per acre. Saw Sanders and Sidwell together right after the sale. They were talking about the sale of the land. The next day Sidwell told me Sanders raised \$2.50 an acre over what he had agreed to. I am acquainted with the value of the land. My land is within one-fourth of a mile of it."

Charles Smith, for defendant, corroborated Branziger as to value of land and as to Sanders and Sidwell being together at the sale.

James Ewing, for defendant, testified, that the land was worth \$100 per acre at the time of sale.

Defendant, Lee Kaster, testified: That he was the son of defendant Nathan L. Kaster. At time of sale, he was in possession as tenant of his father and had been ever since. The land was then worth \$100 per acre. His father and his wife were separated.

The sheriff's deed showed that plaintiff Sanders paid \$68.50 per acre for the one hundred and sixty acres

at the foreclosure sale, leaving a balance due on his judgment at time of trial of \$924.

As to the forty acres, the further additional testimony was given by plaintiff, Sanders. He knew nothing of any trouble except there was a mortgage on the land. He did not know Nate Kaster claimed the court had no right to render the judgment. He bought the property on his own judgment and on what Fogle said that the sale would pass good title. Never read the judgment. Had nobody examine it before he bought the land. They said the title was good and would have to give possession right away. Witness paid \$2,000 for it, that is all he thought it was worth. He did not know when he bid that he would sell it for \$77.50 per acre. Sidwell said, if witness got it, he (Sidwell) would like to have it, but the price was not stated until after witness bought it.

"Q. Wasn't it the understanding that Sidwell wouldn't bid on it, if you did? A. I don't know, I don't remember. Can't say why Sidwell stood right by me and didn't bid on it. Couldn't say it was within less than an hour after I bid on it that I sold it to Sidwell. I expect it was two hours. If I bought the land, I was to sell it to Sidwell, if we could agree on a price. There were others that wanted to buy it. Don't remember whether I had agreed to sell it to anyone else before the sale."

Charles Smith, for defendant, testified: That he was one of the appraisers under the Fogle "judgment" in setting off homestead, and appraised the forty acres at \$75 per acre. He thought they made a reasonable appraisal, but he always did say it was reasonably worth \$100. He also testified that there was something said about a mortgage at the time of the sale, a thousand-dollar mortgage, which covered the one hundred and sixty as well as the forty acres.

The record in the Fogle v. Nathan L. Kaster case, under the execution in which the forty acres were sold

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by the sheriff and purchased by the plaintiff, Sanders, was introduced in evidence. The petition was as follows:

“In the Schuyler County Circuit Court,
“October Term, A. D. 1917.

“*State of Missouri, County of Schuyler—ss.*

“C. C. FOGLE and E. E. FOGLE, composing the firm
of FOGLE & FOGLE, Plaintiffs,

v.

“N. L. KASTER, Defendant.

“Come now the plaintiffs in the above entitled cause and state that, at all the times hereinafter mentioned, they were and still are partners in business under the style and firm name of Fogle & Fogle.

“And for their cause of action against the defendant state that, by the orders and judgments of the Probate Court of Schuyler County, Missouri, made on the 30th day of June A. D. 1913, and recorded in the probate records of said county in Volume 10, at pages 472, 473 and 474 thereof, this defendant was duly adjudged of unsound mind and incapable of managing his affairs, and said probate court, by its said orders and judgments, appointed and constituted one John Sloop as the guardian and curator of defendant, and said John Sloop thereafter duly qualified and acted as such guardian and curator until the 7th day of June A. D. 1916, as hereinafter mentioned.

“That while said John Sloop was the guardian and curator of defendant and acting as such as aforesaid, and on the 20th day of September, 1915, in an action in said probate court wherein these plaintiffs were demandants against the estate of Nathan L. Kaster (this defendant), an insane person, a judgment was by said probate court duly given and made in favor of these plaintiffs and against John Sloop, guardian and curator of Nathan L. Kaster, insane, defendant, for the sum of \$570 and for the costs, to be levied of the property of the said Nathan L. Kaster insane, in the hands of said guardian and curator to be administered, and

said judgment was by said probate court classified and ordered placed in the fifth class of demands; that a duly certified transcript of said judgment is herewith filed and marked 'Exhibit A.'

"That thereafter, by the orders and judgments of said probate court made on the 5th day of April A. D. 1916, recorded in the probate records of Schuyler County, Missouri, in Volume 11, at page 487 thereof, this defendant was adjudged of sound mind and capable of managing his affairs, and said guardian and curator was ordered to make his final settlement at the next regular term of said probate court; that said guardian and curator thereafter filed his final settlement with said probate court, and said court, by its orders and judgments made on the 7th day of June A. D. 1916, recorded in the probate records of said county in Volume 11, at page 515, thereof, approved said final settlement and discharged said guardian and curator.

"That the aforesaid judgment in favor of these plaintiffs yet remains a valid and subsisting judgment and the same is wholly due and unpaid; that by reason of the premises the defendant owes and stands indebted to the plaintiffs in the sum of five hundred and seventy dollars, with interest thereon from the 7th day of June A. D. 1916, at the rate of six per cent per annum until paid, for all of which plaintiffs pray judgment against defendant and for costs of this action.

"FOGLE & FOGLE, Plaintiffs."

Defendant was duly served with summons, but made no appearance, and judgment was rendered by default on October 17, 1917, at the regular October term of said court, in favor of the plaintiffs, for \$616.55. Thereafter, October 30, 1917, the execution under which plaintiff Sanders purchased the land was issued. The sheriff's deed on this sale was regular on its face and conveyed the land to plaintiff Sanders. On April 5, 1916, said N. L. Kaster was duly adjudged to be restored in mind.

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After plaintiff's purchase at execution sale and in due time, said defendant Kaster sued out a writ of error in said Fogle Case to the Kansas City Court of Appeals, which reversed the judgment. [Fogle v. Kaster, 212 S. W. 565.]

The foreclosure suit was originally brought in Schuyler County by said Sanders, as plaintiff, against John Sloop, guardian and curator of N. L. Kaster, an insane person, and said N. L. Kaster, the 16th day of March, 1916. The defendants filed answer, setting up that at the time the note and deed of trust were given, Kaster was insane, and the note was without consideration. Afterwards, defendants took a change of venue to Putnam County, where plaintiff filed reply, denying matter set up in answer, and where judgment on the note sued on, and foreclosing deed of trust on said one hundred and sixty acres, was rendered on November 28, 1917. Motions for new trial and in arrest were filed and consideration thereof continued until the April term, 1918. On December 8, 1917, after the adjournment of the regular November term, plaintiff caused a special execution to be issued directed to the Sheriff of Schuyler County, which was to him delivered on December 15, 1917, and the land was sold thereunder on February 11, 1918, while said motions were under determination. Afterwards, said motions were overruled and defendant Kaster appealed to this court, where the judgment was affirmed. [Sanders v. Kaster, 222 S. W. 133.] The sheriff's deed in the foreclosure proceedings was regular on its face, and conveyed the one hundred and sixty acres to the plaintiff Sanders.

The court found for the plaintiffs, as to the one hundred and sixty acres, and for defendants as to the forty acres. Both parties duly appealed to this court, where their appeals were consolidated.

I. First, as to the one hundred and sixty acres. The fact that the trustee was not made a party to the foreclosure proceeding, in no manner affected its validity,

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Sale.

and could have had no just bearing on the sale, because, we hold, that he was neither a necessary nor proper party. We also hold, that it was defendant's own fault that his wife was not a party defendant, in that, if she was a proper party, defendant should have raised that question by answer or demurrer, and failing to do so, he waived the defect, if any there was. [Sanders v. Kaster, 222 S. W. l. c. 135.] If these facts affected the price for which the land was sold, defendants have no right to complain thereof.

Nor are we impressed with the contention that there was a conspiracy between the plaintiffs, that plaintiff Sidwell was not to bid. There is no evidence that he would have bid or intended to bid, had he made no agreement to buy from Sanders. He could not get a clear title, because of the outstanding dower in Kaster's wife, which we have seen was Kaster's fault for not having her impleaded with him as defendant in the case. Plaintiff Sanders testified that Sidwell did not bid, because he could only buy Kaster's interest. For the same reason, we are not impressed with the insistence that the property sold for any inadequacy of price. Mrs. Kaster's dower not being included in the sale, but only the interest of Kaster, \$68.50 per acre, the price paid by plaintiff Sanders, was a fair price, under all the evidence, for the interest purchased by Sanders. It is far from being a price so inadequate as to warrant a court of equity in setting aside the sale.

We rule, that the sale to plaintiff Sanders, of the 160 acres was valid in all respects.

II. As to the forty acres. The plaintiff Sanders paid \$50 per acre therefor. The evidence tends to show it was subject to \$1,000 mortgage. This would make the price paid equivalent to \$75 per acre for Kaster's interest therein, subject to his wife's dower. This was a fair price for the interest in the property sold.

What we have just said, with reference to the conspiracy claimed by appellant between plaintiffs, that

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Sidwell should refrain from bidding on the one hundred and sixty acres, also applies to the same contention as to the forty-acre tract.

III. It is earnestly contended by learned counsel for defendants, that the Fogle judgment under the execution on which plaintiff Sanders purchased said forty acres was absolutely void, because the petition in that case shows on its face that the circuit court had no jurisdiction, and jurisdiction of the subject-matter was exclusively vested in the probate court. The opinion of the Kansas City Court of Appeals, in that case, was delivered by BLAND, J., and after reciting the petition, was as follows (212 S. W. 565):

Jurisdiction:
No Cause of
Action.

"We think that the petition fails to state a cause of action. It sues upon a judgment rendered by the probate court, which is a judgment *in rem* against the estate (Moody v. Peyton, 135 Mo. 482, l. c. 491, 36 S. W. 621, 58 Am. St. Rep. 604), and attempts to make this judgment a basis of judgment *in personam* against the defendant. This cannot be done. [Johnson v. Kaster, 199 Mo. App. 501, l. c. 503, 204 S. W. 196.] An allowance in the probate court against the estate of an insane person cannot be made a personal judgment against such person when restored to sanity. [Johnson v. Kaster, *supra*; Brown v. Chadwick, 79 Mo. 587.] The judgment is reversed."

As we interpret the language of the learned court, it rules that the petition stated no cause of action, because the claim sued on was not a personal judgment against the defendant Kaster, but only a judgment *in rem* against his estate in the hands of his former guardian. The decision does not, therefore, hold that the circuit court had no jurisdiction, unless the failure of the petition to state a cause of action deprives the court of jurisdiction. But this is not the law. In Cole v. Parker-Washington Co., 276 Mo. 220, 207 S. W. 749, l. c. 766,

the majority of Court in Banc announced the rule in such cases, as follows:

"That the judgment of a court of general jurisdiction, having the parties to the controversy before it, and having power to determine the class of cases for which relief is prayed, is not void, because of the failure of the petition to state a cause of action, and is not, for that reason, open to a collateral attack, is a proposition established in this State, and sustained by the overwhelming weight of authority elsewhere." Citing in support of its conclusion: *Dollarhide v. Parks*, 92 Mo. l. c. 188; *Tube Works v. Ice Machine Co.*, 201 Mo. 58; *Rivard v. Railroad*, 257 Mo. 168; *Jarrell v. Laurel Coal & Land Co.*, 75 W. Va. 752, fully annotated in *L. R. A.* 1916E, pp. 312, 316. The court also quoted the following from *Winningham v. Trueblood*, 149 Mo. l. c. 580, 581: "Whether a complaint does or does not state a cause of action is, as far as concerns a question of jurisdiction, of no importance; for if the complaint states a case belonging to a *general class over which the authority of the court extends*, there is jurisdiction, and the court has power to decide whether the pleading is good or bad (citing cases). In all such cases, collateral attack on the judgment rendered, is altogether inadmissible."

So that, we hold, that the Kansas City Court of Appeals in the Fogle Case did not hold the circuit court had no jurisdiction and its judgment was void for that reason, but simply that the petition in that case did not state a cause of action for a personal judgment against the defendant Kaster.

IV. But it is earnestly contended that one of the cases cited by the learned Court of Appeals in the Fogle Case, namely, *Johnson v. Kaster*. 199 Mo. App. 501, in which the petition was the same as in the Fogle Case, does hold that, in such cases, the circuit court had no jurisdiction, because it was, in effect, an attempt to enforce the judgment of the

Suit in
Circuit
Court.

probate court by execution from the circuit court, which would, in effect, remove the administration of the insane person's estate from the probate court, and that, therefore, the circuit court had no jurisdiction of the subject-matter. We cannot agree to this conclusion reached by the court in that case. The probate court has not exclusive jurisdiction in proceedings against insane persons. Section 514, Revised Statutes 1909, is as follows:

"In all actions commenced against such insane person, the process shall be served on his guardian; and on judgment against such insane person, or his guardian, as such, the execution shall be against his property only."

In *Frost v. Redford*, 127 Mo. l. c. 498, it was held that under Section 5544, Revised Statutes 1889, which is in the same language as Section 514, Revised Statutes 1909, just quoted, an insane person, under guardianship, should be sued in the circuit court. The court said, at page 498:

"He continues to be the owner of the property and may sue by his guardian, be sued and defend by his guardian (and) an execution may issue against his property. [R. S. 1889, sec. 5544.] His property rights and rights under the exemption laws were not changed by reason of his being declared insane and placed under guardianship."

Since that case was determined, Section 499, Revised Statutes 1909, was enacted, which requires the property of the insane ward, if not sufficient to pay all his debts in full, to be prorated among his creditors. But this in no way restricts the jurisdiction of the circuit court to entertain a suit against him. After an insane person is adjudged restored to his right mind, Section 520, Revised Statutes 1909, provides, that: "He shall be discharged from care and custody and the guardian shall immediately settle his accounts and restore to such person all things remaining in his hands belonging or appertaining to him."

So that, when the Fogle suit was brought, as shown by the petition, Kaster had been adjudged restored to his right mind, and the administration of his estate in the probate court was ended and the jurisdiction of that court over him and his estate had terminated. Consequently, he was subject to suit the same as any other person on any valid claims against him.

The case of *St. Louis v. Hollrah*, 175 Mo. 79, was a suit to recover a personal judgment against an insane person for necessities, while such person was under guardianship. It was brought in the circuit court. The defense was that the petition stated no cause of action, and the circuit court had no jurisdiction. This court disallowed both contentions. After setting out in its opinion the statutes relating to insane persons and their estates, which statutes were the same as those applicable in this case, the court said (l. c. 84, 85):

"It is well settled law, 'That, if a statute gives a remedy in the affirmative, without containing any express or implied negative, for a matter which was actionable at common law, this does not take away the common law remedy, but the party may still sue at common law, as well as upon the statute. In such cases the statute remedy will be regarded as merely cumulative. But, where a new right or the means of acquiring it are given, and an adequate remedy for violating it is given in the same statute, then the injured parties are confined to the statutory remedy.' [Citing many cases.]

"In order that this act should have the effect contended for by counsel for defendant, of ousting the jurisdiction of the circuit court, and vesting the same in the probate court, it must afford not only a remedy but an adequate remedy, and that remedy must be exclusive. It fills none of these requirements. The probate court is a court of limited jurisdiction, possesses only such power as is conferred upon it by statute, and can

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exercise its jurisdiction only in the manner prescribed by statute. This act does not confer upon the probate court power to hear, determine and afford adequate relief to a suitor in an action in that court against an insane person. Nor does it provide any method of procedure for that purpose. In fact, instead of providing an exclusive remedy in that court, it provides none at all for such suitor. It is simply a limitation upon his demand, and that limitation does not apply to cases like the one in hand, but is confined to demands against an insane person accruing before the granting of letters of guardianship. There is nothing in this contention."

From the above language, it is clear, it seems to us, that the circuit court has jurisdiction in suits on all claims against insane persons, whether they arose before or during the guardianship, and that the statutory remedy for proving up claims in the probate court against his estate in the guardianship proceedings is not exclusive and does not exist at all after the insane person is adjudged restored to his right mind, his property returned to him, and the guardian discharged, as stated in the petition in the case of *Fogle v. Kaster*, *supra*. The petition in that case, it is true, was not based on the original claim, but on the claim as allowed in the probate court, but it alleged that said allowance constituted an indebtedness of the defendant, for which the plaintiffs prayed judgment as in ordinary cases. Whether the facts stated in said petition constituted a cause of action entitling the plaintiffs to a personal judgment as prayed for, was a question for the circuit court to decide. It had jurisdiction to determine that question. Whether it determined it right or wrong, is not material. If the facts stated did not constitute a personal liability on the part of defendant, the petition, of course, failed to state a cause of action, but this in no way deprived the court of the power,—the jurisdiction—to determine that question. The circuit court had jurisdic-

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tion in all actions for personal judgments against formerly insane persons, who had been discharged from guardianship, and was the only court which did have jurisdiction in such cases. Consequently, the judgment in the Fogle case against the defendant Kaster was not an absolute nullity for want of jurisdiction, but at most simply an erroneous judgment.

We, therefore, disapprove what is said in *Johnson v. Kaster*, 199 Mo. App., *supra*, as to the circuit court having no jurisdiction in such cases.

V. The judgment in the case of *Fogle v. Kaster*, not being void, but simply erroneous, the title of the plaintiff Sanders to the forty acres was good. **Erroneous Judgment: Reversal.** He was a stranger, and not a party, to that proceeding. There was no *supersedeas* staying the execution, and, therefore, the fact that the judgment was subsequently reversed by the Kansas City Court of Appeals in no way impaired his title. [*Shields v. Powers*, 29 Mo. 315; *Vogler v. Montgomery*, 54 Mo. 577; *Schmidt v. Niemeyer*, 100 Mo. 207; *Wood v. Ogden*, 124 Mo. App. 42.]

We hold, therefore, that the plaintiffs' title to both the hundred and sixty acres and the forty acres is valid, and that they are the owners thereof, as described in the petition, and that the defendants have no interest therein. Consequently, the judgment below for the plaintiffs as to the one hundred and sixty acres is affirmed, and the judgment for the defendants as to the forty acres is reversed and the case remanded with directions to the circuit court to set aside its judgment as to said forty acres, and enter judgment that plaintiffs are the owners of said forty acres, and entitled to the possession thereof, and the defendants have no right nor title thereto, and that plaintiffs recover the possession of said forty acres from defendants, together with monthly rents, at the rate of ten dollars per month, from the 11th day

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of February, 1918, until the possession thereof is delivered to them. *Brown and Ragland, CC.*, not sitting.

PER CURIAM:—The foregoing opinion by SMALL, C., is adopted as the opinion of the court. All of the judges concur.

IRENE MARIE HILL, Pro Ami, v. KANSAS CITY
RAILWAYS COMPANY, Appellant.

Division One, July 11, 1921.

1. **NEGLIGENCE: Injury in Kansas: No Pleading of Statutes.** In an action for damages for personal injuries negligently inflicted in Kansas, in which plaintiff pleads no statute or ordinance but does state a cause of action under the general law of negligence, and wherein defendant invoked no statute or other law of Kansas, the law of Missouri applies, and the case is properly tried under Missouri rules of negligence.
2. ———: **Pedestrian on Track: Humanitarian Rule.** A girl five years of age went with her brother to a fountain near the intersection of streets and after getting water they started to retrace their steps northward across railway tracks, and upon reaching the tracks upon which east-bound cars ran the little girl dropped a penny and was looking for it at the time an east-bound car approached, and the brother, having reached the track on which west-bound cars ran and hearing an exclamation from his sister, turned and saw her looking for the penny and shouted to her, but she became confused and did not get off the track; and there was evidence that the car was then fifty feet away, that it could have been stopped in much less than fifty feet, that the view was clear for at least seventy-five feet, that the motorman was talking to some one and not looking ahead, and that no gong was sounded or other warning given. *Held*, that the evidence was sufficient to take the case to the jury under the humanitarian rule, and being so submitted it became their province to determine the credibility of the witnesses who testified to the foregoing facts.
3. ———: **Humanitarian Rule: Concurrent Acts: Pleading and Instruction.** The facts constituting negligence under the humanitarian
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rule may be pleaded with other negligent acts in the same count of the petition, and recovery be had upon the negligence covered by the humanitarian rule, and the instruction may omit all other acts of negligence. Plaintiff is not required to prove all acts of negligence pleaded, if those proven authorize a recovery under the humanitarian rule and the instruction properly submits them.

4. ———: **Pedestrian on Track: Oblivious to Peril.** Under the humanitarian rule, if the operator of a street car sees a person in peril, and oblivious thereto, he is required to use any and all means at hand to avert injury to such person. If he can stop the car, he must stop; if unable to stop, and a slackening of the speed will avert the injury, he must slacken it; if a warning will avert the injury, ordinary care requires him to give warning.
5. **WITNESS: Expert: Qualification: Waiver.** Where an objection that a witness had not shown himself qualified to testify as to the speed of a car was sustained, and thereupon the witness was further qualified and then proceeded without further objection to give his judgment of the speed, opposite counsel are in no position to insist he was improperly permitted to testify.
6. ———: **Written Statement: Denial.** A witness for defendant, who at a former trial was a witness for plaintiff, in a way denied a written statement and his signature thereto. Without objection he signed his name upon a separate piece of paper, and it was admitted for comparison with his purported signature on the statement. Another witness testified that prior to the former trial the witness had admitted that the written statement and signature were his. *Held*, there was no error in the admission in evidence of the written statement.
7. **TRIAL: Misconduct of Court.** In the face of previous irritating conduct of counsel, the trial court is not to be condemned for attempting, by asking questions of the jury, to get at the real issues and facts of the case. And where a witness had testified that the little girl hesitated when she got upon the street railway track, the court, in assuming in his next inquiry, over objection, that she had stopped, especially where the witness subsequently stated she was standing still, was not guilty of misconduct.
8. **MENTAL ANGUISH: Physical Deformity.** Where the little girl's left arm was cut off just below the elbow, her left foot was off back to the heel, the big toe and the one next to it of the right foot were off, and the third toe was broken and bent out and under the foot in a hook shape, there was sufficient evidence for an instruction telling the jury to allow her damages for any mental anguish she had suffered or would hereafter suffer; for these injuries were

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permanent, and mental anguish may be the outgrowth of them as the years come and go.

9. **LEGAL AGE: Subsequent Wages: Law of Forum.** Where the little girl was injured in Kansas and sues for common-law damages in Missouri, the law of the forum governs, and therefore an instruction authorizing the jury to allow her to recover for impaired ability to earn money "after she becomes of legal age," without proving what is the legal age in Kansas, is not erroneous.

Appeal from Jackson Circuit Court.—*Hon. Harris Robinson, Judge.*

AFFIRMED.

Charles N. Sadler and E. E. Ball for appellant.

(1) The court erred in overruling the demurrer interposed at the close of plaintiff's evidence and renewed at the close of all the evidence. (a) The petition fails to state facts sufficient to constitute a cause of action against defendant. 1st. This accident occurred in Kansas, therefore, the laws of Kansas govern. *Newlin v. Railroad*, 222 Mo. 391; *Chandler v. Railroad*, 127 Mo. App. 34; *Rahn v. Railroad*, 129 Mo. App. 686. 2nd. Common law not presumed to exist in Kansas. *Mathieson v. Railroad*, 219 Mo. 542; *First Nat. Bank v. Ins. Co.*, 222 S. W. 837. (b) The evidence did not justify a submission of this case to the jury under the allegations of the petition. 1st. Plaintiff must recover, if at all, upon the particular cause of action pleaded as pleaded. *Beave v. Transit Co.*, 212 Mo. 352; *Detrich v. Railroad*, 143 Mo. App. 179; *Simms v. Dunham*, 203 S. W. 652; *Boles v. Dunham*, 203 S. W. 408; *Murdock v. Dunham*, 206 S. W. 915; *Kirn v. Harvev*, 208 S. W. 479; *State ex rel. v. Ellison*, 270 Mo. 653; *Shafer v. Dunham*, 183 S. W. 670; *Hall v. Coal Co.*, 260 Mo. 351; *Arata v. Ry. Co.*, 167 Mo. App. 90; *Israel v. United Rys. Co.*, 172 Mo. App. 660; *Bobbitt v. Rys. Co.*, 169 Mo. App. 428. 2nd. Where petition charges two or more concurrent negli-

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gent acts combined caused the injury all must be proven to entitle plaintiff to recover. R. S. 1909, sec. 3140; Terry v. Ry. Co., 89 Mo. 587; Turner v. Ry. Co., 78 Mo. 580; Van Note v. Ry. Co., 70 Mo. 642; Downing v. Ry. Co., 70 Mo. App. 661; Kirn v. Harvey, 208 S. W. 479; Wormsdorf v. Ry. Co., 75 Mich. 474; Western Ry. Co. v. McPherson, 146 Ala. 427; Flynn v. Staples, 34 App. D. C. 92, 27 L. R. A. (N. S.) 792. 3rd. Should not have been submitted on issue of failure to warn. Peterson v. Rys. Co., 192 S. W. 940; McManamee v. Railroad, 135 Mo. 449; McNeil v. Ry. Co., 182 S. W. 762; Pope v. Ry. Co., 242 Mo. 238; Green v. Ry. Co., 192 Mo. 131. 4th. Should not have been submitted on humanitarian theory. Markowitz v. Railroad, 186 Mo. 351; Grout v. Ry. Co., 125 Mo. App. 552; Roenfelt v. Ry. Co., 180 Mo. 566; Boyd v. Ry. Co., 105 Mo. 382; Haffey v. Ry. Co., 135 S. W. 937; Mockowick v. Ry. Co., 196 Mo. 570; Barnard v. Ry. Co., 137 Mo. App. 684; Van Bach v. Ry. Co., 171 Mo. 347; Gessner v. Ry. Co., 137 Mo. App. 47; Banks v. Ry. Co., 217 S. W. 488; Oglesby v. Ry. Co., 177 Mo. 272. (2) The court erred in giving instructions asked by plaintiff. Authorities under Point one. (3) The court erred in admitting incompetent, irrelevant and immaterial evidence offered by plaintiff. (a) Broadens issues made by pleadings. Shafer v. Dunham, 183 S. W. 670; Hall v. Coal & Coke Co., 260 Mo. 351; Bergfeld v. Dunham, 202 S. W. 253; Davidson v. Transit Co., 211 Mo. 363; Roscoe v. Railroad, 202 Mo. 576. (b) Invades province of jury. Taylor v. Ry. Co., 185 Mo. 256; Glasgow v. Ry. Co., 191 Mo. 364; Smart v. Kansas City, 208 Mo. 199; 203; Castanie v. Ry. Co., 249 Mo. 195. (4) The court erred in refusing to admit competent, relevant and material evidence offered by defendant. Authorities under last point. (5) The court erred in making improper remarks during trial; in preventing defendant from properly conducting its defense, and in improperly examining witnesses. McElwain v. Dunham, 221 Mo. App. 773; Landers v. Railroad, 134 Mo. App. 80;

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Dreyfus v. Railroad, 124 Mo. App. 592; Jackmann v. Railroad, 187 S. W. 787; Levels v. Railroad, 196 Mo. 619; Rose v. Kansas City, 125 Mo. App. 235; Buck v. Trust Co., 185 S. W. 213; Hutchinson v. Gate Co., 152 S. W. 65; 40 Cyc. 2439, 2440; Knox v. Fuller, 23 Wash. 34; 38 Cyc. 1316; Berwind Co. v. Firment, 170 Fed. 154. (6) The court erred in refusing to sustain the motion for new trial on the ground that it is against the weight of the evidence. Lehnick v. Ry. Co., 118 Mo. App. 611; Morris v. Kansas City, 117 Mo. App. 303; Baughman v. Fulton, 139 Mo. 558; Bohle v. Merc. Co., 144 Mo. App. 441; Northrop v. Diggs, 115 Mo. App. 93; Ridge v. Johnson, 129 Mo. App. 546; Reid v. Insurance Co., 50 Mo. 429; Powell v. Ry. Co., 59 Mo. App. 340; Kreitzel v. Stevens, 155 Mo. 285; Lawson v. Mills, 139 Mo. 172; Gould v. St. John, 207 Mo. 619.

Atwood, Wickersham, Hill & Popham for respondent.

(1) The law of Missouri and not the law of Kansas governs. Plaintiff's petition stated a common-law cause of action. Defendant did not plead the laws of Kansas, hence the common law as applied by the Missouri courts governs. Lyons v. Railroad, 253 Mo. 151; Thompson v. Railroad, 243 Mo. 349; Biggie v. Railroad, 159 Mo. App. 351. (2) The acts of negligence pleaded in plaintiff's petition were stated disjunctively. Plaintiff could submit any or all acts of negligence justified by the evidence. It is not the law, as stated by appellant, that all or none of the alleged negligent acts must be submitted to the jury. Meeker v. E. L. & P. Co., 216 S. W. 931; Hanson v. Traction Co., 226 S. W. 1. (3) There was overwhelming evidence that no warning was given of the approach of the car. Due care under the circumstances required the motorman to sound warning. Petition charged failure to warn as one of the grounds of negligence and plaintiff's Instruction No. 1 properly sub-

mitted this issue to the jury. *Ellis v. Met. St. Ry.*, 234 Mo. 683; *Cytron v. Transit Co.*, 205 Mo. 693; *Muller v. Harvey*, 204 S. W. 929; *Argeropoulos v. K. C. Rys. Co.*, 212 S. W. 375. (4) The evidence shows conclusively that this child—hardly five years of age—was on the east-bound track in deadly peril when the street car was at or beyond the spur or cross over switch to the west, a distance at least of from fifty to seventy-five feet away. The testimony showed the car running at the speed stated by plaintiff's witnesses and defendant's conductor, could have been stopped within fifteen feet. The motorman on the west-bound car, defendant's witness, testified car could be stopped from fifteen to twenty-five feet. This made out a clear case for the jury. *Ellis v. Met. St. Ry.*, 234 Mo. 656; *Holmes v. Railroad*, 207 Mo. 163; *Livingston v. Railroad*, 170 Mo. 471; *Turnbow v. Dunham*, 197 S. W. 107; *Simon v. Railroad*, 231 Mo. 78. (5) Plaintiff was injured in a thickly settled part of Kansas City, Kansas. A drinking fountain was located opposite the point of accident which was much frequented by children. It was the duty of defendant's motorman not only to keep a sharp lookout ahead for children on the street, but to take note of the practice of children to be about the drinking fountain and of their crossing the street at this point and to govern his conduct accordingly. Cases under Points 3 and 4. (6) The point made by appellant that the court was guilty of improper conduct was utterly without foundation. The records show the court's attitude to have been impartial and fair, and that the attitude of counsel for defendant towards the trial judge throughout the trial was insolent and disrespectful. The small award of damages of which appellant makes here no complaint, shows that the final result was in no wise affected by any extraneous circumstances. *Buck v. Buck*, 267 Mo. 662. (7) Point No. 6 of appellant is wholly without merit because the greater weight of the evidence was in favor of plaintiff and against the defendant. But if it had been otherwise,

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this court will not weigh and settle conflicts in evidence. Orblitt v. Bergfold, 191 S. W. 999.

GRAVES, J.—Irene Marie Hill, a negro girl some five years old at the time of the incident which occasioned her injury, sues through her next friend, for damages alleged to have been occasioned by the negligence of defendant's predecessor in title to the street railway property now operated by defendant. Defendant was the purchaser at a receivership and foreclosure sale of the property. The injury occurred whilst the railway property was in the hands of receivers, but no point is made as to the liability of this defendant, if its predecessor in title, or the receivers, were liable. So the case proceeded as if the instant defendant had been the owner and operator of the street railway property at the time of the accident. The accident occurred June 16, 1915, at 7:30 p. m. in the State of Kansas, near the intersection of Quindaro Boulevard and 7th Street, in Kansas City, Kansas. There was a double-track street railway in Quindaro Boulevard. The negligence charged is thus stated in the petition:

“Plaintiff states that the said receivers and their agents and servants in charge of said car were careless and negligent in that they failed to give plaintiff any warning signals of the approach of said car to her and to said intersection, and in that they were negligently operating said car without keeping proper or reasonably sufficient lookout ahead, and without having or keeping same under proper and reasonable control. Plaintiff further says that those in charge of said car were further negligent in that they saw or by the exercise of ordinary care could have seen plaintiff upon said track or so near the same and in such position as that she was in a position of danger and peril from the approach of said car, in time, by the exercise of ordinary care, under the conditions then existing, and with the use of the appliances at hand, to have stopped said car, slackened the speed

thereof, or have warned plaintiff of the approach thereof, and thereby have avoided injuring her, all of which they negligently and carelessly failed to do.

"Plaintiff further states that as a direct and proximate result of the negligent and careless acts and omissions of those in charge of said car, as above described, all of said acts and omissions acting severally and concurrently with each other, she was struck, run over and injured by said car, at said time and place, injuring her in the following manner and particulars, to-wit."

The answer was a simple general denial. Plaintiff had a verdict for \$10,000, and from a judgment entered thereon the defendant has appealed. There are some five or six assignments of error, which, with the relevant facts, will be noted in the course of the opinion.

I. It is first urged that the demurrer to the evidence should have been sustained. This insistence has several sub-divisions in the brief, stated thus:

"(a) The petition fails to state facts sufficient to constitute a cause of action against defendant.

"1. This accident occurred in Kansas, therefore the laws of Kansas govern.

"(b) The evidence did not justify a submission of this case to the jury under the allegations of the petition."

When boiled down there are but two real questions raised in the foregoing, i. e.: (1) the accident having occurred in Kansas, it is governed by the Kansas law, and being so governed, we cannot presume that the common law exists in Kansas, and (2) that the evidence failed to show liability.

As to the first proposition, *supra*, it must be conceded that the action is founded upon common-law negligence, as distinguished from statutory or ordinance negligence. The petition pleads no statute or ordinance. It states a cause of action under our general law of negligence. The defendant invoked no law of Kansas, stat-

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utory or otherwise. In such situation the case was properly tried under our rules of negligence. [Lyons v. Railroad, 253 Mo. l. c. 150-151.] In the Lyons case we discussed both the Mathieson case, and the Newlin case, relied upon by the appellant, in its brief. We can add nothing to what was said in Lyons's case. The action there was bottomed upon common negligence, as in this case. The answer there was a general denial, as in the instant case. We then said: "In such case, unless the defendant properly invokes the laws of the sister state, the law of Missouri is to be applied." So say we in the case before us. As to whether the evidence on the part of the plaintiff made a case under our law, we take next.

II. That there was evidence to take this case to the jury under the humanitarian rule we have no doubt. The main instruction for the plaintiff, whilst verbose and lengthy, places her case upon the humanitarian rule. The little girl and her brother had gone to a water fountain near the street intersection. After getting water at this fountain they started to retrace their steps toward the north or northeast across the double railways tracks. Upon reaching the tracks upon which east-bound cars run, the plaintiff dropped a penny, and was looking for it at the time the east-bound car approached. The brother was ahead, and had reached the track upon which west-bound cars ran, when hearing an exclamation from the sister he turned and saw her looking for the penny, and "hollowed" at her, but she became confused and did not get off the track. He says the car was fifty feet away from her when he turned around. He further says that the motorman was talking to some person and not looking ahead. Other witnesses say that the little girl was on the track, in clear view of the motorman for at least seventy-five feet. They likewise corroborated the brother as to the motorman being engaged in conversation. There was ample evidence that at the rate of speed shown, the car could have been stopped in very much less

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than fifty feet, one witness placing it as low as fifteen feet. So also there is evidence that no gong was sounded or other notice given to the child. The facts sufficed to take the case to the jury, and it then became the province of the jury to determine the credibility of the witnesses detailing the foregoing facts. The demurrer was properly overruled upon both the questions urged by appellant.

III. The further point made is thus couched in the brief: "Where petition charges two or more **Concurrent** current negligent acts combined caused the **Negligence.** injury all must be proven to entitle plaintiff to recover."

The point is not clear to us in view of the record. The petition, after stating some other acts of negligence, thus pleads the humanitarian rule:

"Plaintiff states that the said receivers and their agents and servants in charge of said car were careless and negligent in that they failed to give plaintiff any warning signals of the approach of said car to her and to said intersection, and in that they were negligently operating said car without keeping proper or reasonably sufficient lookout ahead, and without having or keeping same under proper and reasonable control. Plaintiff further says that those in charge of said car were further negligent in that they saw or by the exercise of ordinary care could have seen plaintiff upon said track or so near the same and in such position as that she was in a position of danger and peril from the approach of said car, in time, by the exercise of ordinary care, under the conditions then existing, and with the use of appliances at hand, to have stopped said car, slackened the speed thereof, or have warned plaintiff of the approach thereof, and thereby have avoided injuring her, all of which they negligently and carelessly failed to do.

"Plaintiff further states that as a direct and proximate result of the negligent and careless acts and omis-

sions of those in charge of said car, as above described, all of said acts and omissions acting severally and concurrently with each other, she was struck, run over and injured by said car, at said time and place, injuring her in the following manner and particulars, to-wit:”

We have so often ruled that the negligence covered by the humanitarian rule may be pleaded with other acts of negligence in the single count of a petition, and that a plaintiff may abandon all other alleged negligence, and recover upon the negligence which is covered by the humanitarian rule, that citation of authorities would be superfluous. In this case the plaintiff chose to submit her case upon the humanitarian rule, although the instruction is cumbersome. The allegations in the petition as to stopping the car, slackening the speed of the car and giving warning are all in the disjunctive, and the instruction so placed them, but the instruction leaves out of consideration the slackening of the speed of the car. The concluding portion of the instructions reads:

“And that the operator of said car saw or by the exercise of ordinary care could have seen plaintiff in such position of danger and peril, if any, and could by the exercise of ordinary care have known all of the above facts, if you so find, such to be the facts, in time thereafter by the exercise of ordinary care and by the use of the means at hand and with safety to said car and those aboard same, to have stopped said car or warned plaintiff of the approach thereof, if you so find, and could thereby have prevented injuring her, if you so find, and that the operator thereof failed to exercise ordinary care to stop said car or give reasonable warning of the approach thereof, if you so find, after he knew (if you so find he did) or by the exercise of ordinary care could have known (if you so find he could) that plaintiff was in such danger and peril, if any, as above set out, and that by such failure, if any, such operator was thereby negligent, if you so find, and that as a direct result of such negligence, if any, said car struck plaintiff and she

was thereby injured, if you so find, then your verdict must be for plaintiff."

The previous portion of the instruction had required the jury to find that plaintiff was upon the track and was oblivious to her danger, and had defined the duty of defendant under such circumstances. Under these pleadings (so far as the humanitarian rule is concerned) the instruction did not have to require the jury to find all three of the things specified in the portion of the petition quoted, *supra*. The instruction left out the matter of slackening speed. It might have included it, because there was evidence tending to show no slackening of speed until the child was struck, but there was no error in leaving that matter out. The instruction might have left out both the matters of slackening speed and failure to stop, and submitted on the single matter of failure to warn. In *Hinzeman v. Railroad*, 182 Mo. l. c. 623, *VALLIANT, J.*, said: "If the engineer saw the man in a position of danger, apparently inattentive to the approaching train, and if, with the means at hand, by the exercise of ordinary care, he could have given him timely warning, yet neglected to do so, then the case falls within the exception to the rule that a plaintiff cannot recover if his own negligence has contributed to his injury." See also *Cytron v. Transit Co.*, 205 Mo. l. c. 719, and cases therein cited, including the *Hinzeman* case; *Meeker v. Union Electric Light & Power Co.*, 279 Mo. 574, 216 S. W. 931; *State ex rel. v. Ellison*, 223 S. W. l. c. 673.

Under the humanitarian rule, if the operator of a car sees one in peril, and oblivious thereof, then he is required to use any and all means at his hand to avert the injury of such person. If he can stop his car, he must stop. If the slackening of speed, although unable to stop, will avert the injury, he must do that. If a warning will avert the injury ordinary care requires that of such operator. So in this case under the pleadings, *supra*, the cause was properly submitted to the jury.

IV. There are several objections made as to the admission of incompetent evidence. Generally the objections now urged are not of weight. It is urged that witness Wren was improperly permitted to testify as to the speed of the car. Objection was made and the court sustained the objection on the ground that the witness had not shown himself qualified to speak upon that question. Thereupon counsel for plaintiff, with a question or two from the court, proceeded to qualify the witness, and the witness then gave his judgment of the speed without further objection by counsel for the defendant. Counsel are in no position to urge this question.

Much is said about the court in what occurred in the following testimony from witness Sturges:

Stopping or Hesitating. "COURT: State what you saw? A. The little girl started across the track and when she got on the track she became confused and the car struck her and it run over her.

"COURT: Became confused at what, just strike that out, and state what she did. A. When she got on the track (interrupted)—

"Q. When she got on the track, did she go across or stop? A. She did not have time before the car struck her.

"MR. HARDIN: I move the answer of the witness be stricken out as a conclusion.

"COURT: The objections are sustained.

"COURT: Did she keep going across? A. She became confused, apparently she has lost her head.

"Q. What did she do? A. She hesitated.

"Q. How long did she hesitate? A. Well, I could not say as to that.

"Q. Did she stop? A. Yes, sir, she hesitated on the track.

"COURT: What way did she go as she was walking across the track? A. Crossed from the south to the north.

"Q. She was going north? A. Yes, sir.

"COURT: When she got on the track she stopped?
A. Yes, sir.

"MR. HARDIN: I object to that, he did not say she stopped, he said she hesitated.

"COURT: I will overrule it; go ahead.

"To which ruling of the court the defendant by its counsel then and there duly excepted.

"MR. HARDIN: I move that all be stricken out.

"COURT: The motion is overruled.

"To which ruling of the court the defendant by its counsel then and there duly excepted.

"COURT: Which way was she facing when she stopped?

"MR. HARDIN: I objected to that as assuming she stopped, and not proper examination.

"COURT: Same ruling; objections are overruled.

"To which ruling of the court the defendant by its counsel then and there duly excepted.

"A. I could not say as to which way the little girl was facing when she stopped.

"COURT: She had been going north? A. Yes, sir.

"COURT: Did she turn or make any movement? A. I do not remember as to that.

"COURT: Was she standing still or moving when the car struck her; did you see the car strike her? A. No, sir, I was back a little too far for that.

"COURT: The front end? A. Yes, sir.

"COURT: How far did you see her ahead of the car?
A. When I first noticed the little girl?

"COURT: No, the last distance you could see her?

A. Well, I should judge the little girl was ten or fifteen feet in front of the car.

"COURT: When your view was shut off? A. Yes, sir.

"COURT: At that time was she standing still or walking? A. I think she was standing still.

"COURT: You don't know which way she was looking, you do not remember? A. No, sir, I do not remember."

When all this evidence is read, it is clear that the witness meant in the first instance to say that the little girl stopped upon the track. The question was, "Did she stop?" The answer was, "Yes, sir, she hesitated on the track." From that the court took it that the witness meant that she stopped (a least for a short time) on the tracks, and the subsequent testimony of the witness shows this to be a fact. For later he was asked whether she was standing still or walking, and the witness said: "I think she was standing still." When the whole testimony is examined we can see no error in the action of the court.

Complaint is made of the introduction of a written statement made by one G. B. Mitchell, who was at a former trial a witness for plaintiff, but at this time a witness for defendant. It was shown that Mitchell said that the signature and statement were his, but he in a way denied the statement and signature at the trial. Without objection the witness signed his name on a paper, and the two were admitted for comparison by the jury. The statement tends to contradict Mitchell's testimony. One witness testified that prior to the former trial Mitchell had admitted that the written statement and signature were his, and from it all we must rule that there was no error in the admission of the document.

Other objections as to the testimony do not merit notice, and we pass to other questions.

V. Misconduct upon the part of the trial court is charged as error. This misconduct was in the manner of the court examining witnesses. In a previous paragraph, in discussing the admission of evidence, we have set forth the worst aspect of the court's conduct. The previous irritating conduct of the then trial counsel might be also set out with justification, but we shall not so do. Counsel briefing the case here did not appear below. Suffice it to say that it was sufficient to irritate a court, who was trying to get at the

**Written
Statement.**

**Misconduct
of Court.**

real issues and the facts therein. We do not think the action of the court sufficient for a reversal of the judgment. Nor do we think there was harmful error in refusing to admit some evidence offered by defendant.

Further, this court will not disturb a verdict simply because it is against the weight of the evidence. That is for the trial court. If there is substantial evidence to support the verdict (as here) we will not review the evidence to determine the weight, or attempt to interfere with the province of the trial court in such matters. The defendant urges that we reverse the judgment, because against the weight of the evidence. This, like its contention of the refusal to admit proper evidence, must be overruled. No question is made in the assignment of error as to the size of the verdict, so that the propriety of the instructions given is all that there is left to this appeal.

There are so many sub-divisions of contentions in the voluminous brief, that we are forced to treat several of them in one paragraph—a bad practice, we admit.

VI. In the assignment of errors the defendant complains of instructions A and B given for plaintiff. Instruction A is the instruction on the humanitarian rule.

Instructions. We have, in connection with other matters, set out the material parts of this instruction, and we find no error in it. Instruction B is one upon the measure of damages. The instruction is a usual one in this class of cases, and the criticism thereof is supercritical. The following clause therein is criticised:

“Any mental anguish, if any, which the jury finds and believes from the evidence she has suffered and such, if any, as the jury find and believe from the evidence she will with reasonable certainty hereafter suffer as a direct result of such injuries.”

**Mental
Anguish.**

It is urged that there is no evidence that the little girl suffered or will suffer any mental anguish, as distinguished from bodily pain. The fearful injuries to

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the child were fully described to the jury. The left arm was off just below the elbow. The left foot was off back to the heel. The big toe and the next one to it, of the right foot, were off, and the third toe was broken and bent out and under the foot in hook shape. This was the physical condition, which she must carry through life. Mental anguish is distinguishable from mere pain, and may be the outgrowth of just such a condition as we have described. As the years pass the condition for its production remains. We have omitted to state the nervousness shown to have been, and at the trial being, suffered by plaintiff.

Next it is said that the instruction is erroneous, because it authorized the jury to allow her to recover for impaired ability to earn money "after she became of legal age." Of this it is said that this court will not presume that a Missouri jury would know the legal age of a girl in Kansas. The presumption is indulged that the law of the forum is the same as that of Kansas. We touched upon this question in the first portion of this opinion. We do not deem the instruction improper. The judgment is affirmed. All concur.

NETTIE L. ELAM, Appellant, v. EDITH PHARISS et al.

Division One, July 11, 1921.

1. **WILL CONTEST: Substituted Pages: Finding of Jury Conclusive.** After the will was written it was submitted to the testatrix, who said it was what she wanted. Two neighbor women were called in and testatrix showed them the instrument, told them it was her will, expressed satisfaction with it and asked them to witness it, and this they did. On cross-examination of these witnesses it was developed that they were unable to identify positively sheets one and two of the instrument, and were able so
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to identify only sheet three on which their signatures appeared; but the draftsman testified he was present when the will was signed and that it was then in the exact condition in which it was when put in evidence at the trial, and there was no evidence of fraud, but there was ample evidence, direct and otherwise, that the instrument was her genuine will. *Held*, that there was no ground for so much as a suspicion that the will signed by testatrix was not the same document put in evidence at the trial, but the question being nevertheless submitted to the jury the finding sustaining the will is conclusive on appeal.

2. —: **Mistake: Legal Advice As to Husband's Curtesy.** Testatrix gave written directions for the contents of her will, and after it was written and submitted to her she caused it to be re-written in order to correct a minor error. Being re-written and submitted to her, she read it and said it contained the exact provisions she desired to be incorporated in it, and it was then signed and witnessed, and there is no real contention that she did not know its contents. There was no mental, physical or educational impediment to her understanding it, and there was no evidence of fraud, coercion or undue influence. Giving the fee in remainder to two children, it devised to her husband a life estate in her real estate, in lieu of all his "other rights, interests or claims" in her estate, and provided that out of the income of the property he should use \$150 a year, until \$1000 should be so used, to purchase a home for another child, the contestant. The draftsman testified that the matter of the husband's rights were discussed, and that he advised her that a surviving husband was entitled to a life estate in one-half of his wife's property. *Held*, first, there being no evidence to show how she held the property devised and it being the law that property may be so conveyed that the husband's curtesy is excluded and the wife's estate one of which she can dispose by will, the instrument cannot be held not to be her will on the ground that her husband was entitled by the curtesy to a life estate in her lands, and that the attempt to impose a charge upon it in favor of contestant was therefore unavailing, and testatrix received and acted upon unsound advice concerning her husband's marital rights in her lands, for in order to so hold it would be necessary to assume that her title was so taken that his curtesy was not excluded; and, *second*, even though the assumption were permissible, the mistake was not such as would authorize a setting aside of the will.
3. —: **Mistake As to Legal Effect of Provisions.** A mistake of law in the mind of the testator, who is of sound mind and free from undue influence, or a mistake as to the legal effect of provisions contained in the will, will not invalidate the will. Where

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testatrix was advised by an attorney that her surviving husband would have a curtesy equal to a life estate in one-half of her property, and, in lieu of all his "other rights, interests and claims," she devised to him a life estate charged with the obligation that he should pay to one of her daughters one thousand dollars, such advice, even though erroneous, and such provision in the will, even though she may not have understood its legal import, are not sufficient for refusing probate to her will.

Appeal from Jasper Circuit Court.—*Hon. Joseph D. Perkins*, Judge.

AFFIRMED.

Oscar B. Elam for appellant.

(1) The power of a married woman to make a will devising land is not absolute and unconditional. It is "subject to the rights of the husband, if any, to his curtesy therein." Sec. 536, R. S. 1909. (2) Presumptions as to facts always take flight upon the appearance of the facts themselves. *Brown v. Brown*, 237 Mo. 668. (3) "Gross inequality in the dispositions of the property, where no reason for it is suggested, either in the will, or otherwise, may change the burden, and require explanation on the part of those who support the will to induce the belief that it was the free and deliberate offspring of a rational, self-poised, and clearly disposing mind." 1 *Redfield on Wills*, 537, 516; *Lynch v. Clements*, 24 N. J. Eq. 431; *Gay v. Gillian*, 92 Mo. 250, 264. (4) "The fact that the will in question displays an entire change from former intentions is strong evidence of undue influence in its procurement." 1 *Jarmon on Wills* (5 Ed.), p. 139. (5) A will procured by lying is no less invalid than a will procured by violence. *Smith v. DuBoise*, 78 Ga. 413; *In re Budlong's Will*, 126 N. Y. 423, 7 N. Y. Supp. 289. (6) If decedent did not know the contents of the will the court will direct a verdict rejecting the will. *Bradford v. Blossom*, 207 Mo. 228. (7) The rule that "a mistake of law, pure and simple,

is not an adequate ground for relief is confined to mistakes of the general rules of law; it has no application to the mistakes of persons as to their own private legal rights and interests." 1 Jones' Commentaries on Evidence, p. 151, sec. 24 (21); *Burton v. Haden*, 108 Va. 51, 15 L. R. A. (N. S.) 1038. (8) A mere capacity to understand the will is not under the pleadings and circumstances of this case all that was required of the testatrix; under the pleadings in this case the burden was upon proponents to show that testatrix did in fact understand "the meaning of the instrument" executed as a will. *Carlson v. Lafgran*, 250 Mo. 527, 533; *Cowan v. Shaver*, 197 Mo. 203, 212. (9) If an attending witness attested only one sheet of paper, believing at the time that the whole will was contained on that sheet of paper, and was not advised or informed that other sheets of paper contained other portions of the will, or even if so informed and the other sheets were not within sight of the attesting witnesses, the attestation is not good under the statute. The identification is not complete. The statute is mandatory. *McGee v. Porter*, 14 Mo. 611, 55 Am. Dec. 129; *St. Louis Hospital Assn. v. Williams*, 19 Mo. 617; *Northcutt v. Northcutt*, 20 Mo. 268; *Simpson v. Simpson*, 27 Mo. 288; *Catlett v. Catlett*, 55 Mo. 341; *Gordon v. Burris*, 141 Mo. 602; *Chafee v. Baptist Convention*, 10 Paige (28 Chancery) 85; *Cabett on Appeal*, 8 Watts & Sergeant, 21, 40 Am. Dec. 225. (10) The motion notwithstanding the verdict must be sustained in the case at bar on the pleadings and the evidence. *Dezell v. Casualty Company*, 176 Mo. 253, 293; 2 *Bouvier's Law Dictionary* (Rawle's Third Revision) p. 1719. (11) If proponents themselves show that the paper offered is not what the testator was made to believe it was when he signed it, it cannot be adjudged to be his will, even in the absence of any averments to that effect in the petition of the contestants. *Cowan v. Shaver*, 197 Mo. 203, 212. A contest is in the nature of an appeal from the probate court, and when instituted by a

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party in interest vacates the interlocutory judgment (of the probate court). . . . The institution of such contest imposes upon the circuit court the duty of determining the question of will or no will." State ex rel. v. McQuillin, 246 Mo. 688; Dickey v. Malechi, 6 Mo. 177; Benoist v. Murrin, 48 Mo. 48; Cash v. Lust, 142 Mo. 637; Hogan v. Hinchey, 195 Mo. 527; Teckenbrock v. McLaughlin, 209 Mo. 533. (12) The burden of proof is upon the proponents of the will. State ex rel. v. McQuillin, 246 Mo. 674, 689; Benoist v. Murrin, 58 Mo. 322; Norton v. Paxton, 110 Mo. 461; Teckenbrock v. McLaughlin, 209 Mo. 533.

H. H. Bloss for respondents.

(1) The validity or effect of the provisions of a will cannot be determined in a will contest, but the only issue is whether the will sought to be established was the will of the deceased. Cox v. Cox, 101 Mo. 168; Gordon v. Burris, 141 Mo. 602; Tingley v. Cowgill, 48 Mo. 291; Lilly v. Tobbein, 103 Mo. 477. (2) The only burden that rested on the proponents of this will was to prove its due execution, proper age, sound mind, and all this was abundantly done. Card v. Gabil, 120 Mo. 283; Maddox v. Maddox, 114 Mo. 35. (3) It is not necessary that the witnesses attest every sheet of a will or that it shall be shown to them. It is sufficient if all the sheets were in the room at the time of the execution and the attestation, and in the absence of proof to the contrary such is the presumption, and sheets which are bound together and constitute the will after the testator is dead are presumed to have been bound together at the time of attestation. 30 Amer. & Eng. Ency. Law (2 Ed.), 603. (4) The petition in this case charged that the beneficiaries of the will unduly influenced the testatrix in the execution thereof plaintiff is concluded by these statements and her proof should be confined to the persons charged, and she is not now permitted to urge on her part that she was misled by her attorney as to

her husband's rights by curtesy. *Jackson v. Hordin*, 83 Mo. 175. (5) A will contest being a law action the finding by the jury based on sufficient evidence as to due execution, mental capacity, etc., is conclusive on the appellate court. *Butler v. Assn.*, 73 Mo. 242; *Benoist v. Murrin*, 58 Mo. 307. (6) If the husband takes under this will, he waives his curtesy rights and there is no allegation in the petition that he has not accepted the provisions of the will, which he is by answer and otherwise trying to sustain; hence, no one is injured and the property is being distributed exactly as the deceased wanted it. *Caster v. Gray*, 159 Mo. 588.

JAMES T. BLAIR, J.—This is a will contest. There was a verdict upholding the will, and judgment was rendered accordingly. Appellant and respondents Nathaniel Merle Wheat and Edith Phariss are the children and heirs at law of testatrix. Respondent N. M. Wheat is her surviving husband, and he and respondent Elliott are the executors under the will.

By the will testatrix devised (1) to her son three lots and parts of two other lots in Aurora and a one-half interest in a tract near the city—all subject to a life estate in N. M. Wheat, the husband; (2) to her daughter Edith Phariss one parcel in fee simple, and a remainder, subject to a life estate in N. M. Wheat, in three lots or parcels in Aurora and in a one-half interest in the above-mentioned tract near that city; (3) to N. M. Wheat, surviving husband, a life estate in all the property described in the devise to the son and in all that described in the devise to the daughter, Edith Phariss, except one-half of one lot. The will provides that the bequest to the husband is made in lieu of all his "other rights, interests or claims" in the estate of testatrix, and then provides that out of the income of the property devised to him for life he shall use \$150 per year, until \$1,000 shall have been so used, to purchase a home for appellant; that the home so provided shall be held by trustees and shall be

so held until after the death of the then husband of appellant, and upon his death the title shall be conveyed to appellant, if living; and if she shall have predeceased her husband, then to appellant's heirs, "excluding her said husband, however." The residue of the estate was devised to the son and Edith Phariss in equal shares. A clause providing for the exclusion of any devisee who might contest the will is added.

The petition sets out the will, and then, alternatively and on information and belief, alleges fraud, duress, undue influence and mistake. These allegations need not be set out in full. It will suffice to say that they are sufficiently broad that no contention made in appellant's brief need be denied consideration because of want of a proper allegation in the petition. An answer and reply were filed.

Proponents offered evidence tending to show that early in October, 1916, testatrix prepared memoranda showing the disposition she desired to make of her estate and took them to an attorney for the purpose of having him draw her will. She discussed the matter with him and left the notes with him for his guidance. He prepared the will according to the directions, and submitted the document to testatrix. She required him to make a change or two, and the will was written and returned to testatrix. At this time the draftsman read it over to her. He testified it contained exactly what testatrix directed to be put in it; that she stated the will as written "was what she wanted." Two neighbor women were called in and testatrix showed them the instrument, told them it was her will, expressed her satisfaction with it and asked them to witness it. This they did. The only evidence pertaining to the testamentary capacity of testatrix is to the effect that her mental condition was good. There is no evidence tending to show that any of the respondents intermeddled in any way with the preparation of the will, or that any one of them was present when it was signed. There was no evidence to support the allegations of fraud, coercion or undue influence.

In the cross-examination of the witnesses to the will it was developed that they were unable to identify positively sheets one and two of the instrument and were able so to identify only sheet three upon which their signatures appeared. Some of the answers of these witnesses are made the basis of a contention that other sheets have been substituted for original sheets one and two. The draftsman testified he was present when the will was signed and that it was then in the exact condition in which it was when put in evidence in this case. This witness also testified that the matter of a husband's rights was discussed. He said he advised testatrix that a surviving husband was entitled to a life interest in one-half of his wife's property. There was no evidence to show by what title testatrix held the property she devised. After the will was executed testatrix took charge of it. She died July 22, 1916, and the will was duly probated.

I. The contention that the will signed by testatrix and witnessed at her request was not the same document as that which was put in evidence in this case has for its foundation nothing more than a strained construction of an answer here and there in the cross-examination of a witness or two. Properly understood these answers do not justify the construction appellant gives them. There is no evidence of fraud. There was ample evidence, direct and other, that the document in evidence is the genuine will. There is, in fact, no ground for so much as a suspicion that it was not. Nevertheless, the question was submitted to the jury and the finding thereon was adverse to appellant, and is conclusive here.

II. Authorities are cited which bear upon undue influence, confidential relations and the burden of proof resulting therefrom, and the probative effect of a radical change in testamentary intention. There is an entire absence of any evidence

**Substituted
Pages.**

**Undue
Influence.**

which calls for the application of the principles of these decisions.

III. Testatrix knew the contents of this will. Counsel does not really contend to the contrary. Testatrix gave written directions for its preparation. It was drafted and submitted to her. She caused it to be re-written in order to correct a minor error. It was re-submitted and read to her. It contained the exact provision she required to be incorporated in it. There was no mental, physical or educational obstacle to her understanding it. Her mind was sound. She was not blind or otherwise so afflicted that she could not read. The will was written in her own language. She approved it as written. There was no evidence of fraud, coercion or undue influence. It is now contended that though testatrix knew what the will contained and that it contained the provisions she directed should be put into it; yet it must be held not her will because she received unsound advice concerning the rights of a surviving husband in the realty of his wife. The bequest of \$150 per annum to be used for a home for appellant is to come out of the income from the life estate given the husband. It is said this bequest is an ineffective bequest; that the husband of testatrix was entitled by the curtesy to a life estate in the realty of his wife and that the attempt to impose a charge upon it in favor of appellant is unavailing. From this it is argued that appellant gets nothing under the will; that the will shows an intent to give her a home; that the error grew out of the erroneous advice testatrix received and this constitutes a mistake which defeats the whole will. The record does not so much as suggest bad faith on the part of the draftsman. The advice he gave was given in an honest belief that it was sound—a belief which the record shows was adhered to when the draftsman testified on the trial of this case.

(1) In the first place the evidence does not show how testatrix held the land she devised. Property may

be so conveyed that the husband's curtesy is excluded and yet the wife's estate may be one of which she can dispose by will. [Jamison v. Zausch, 227 Mo. l. c. 412, et seq.; McTigue v. McTigue, 116 Mo. l. c. 142, 143.] The exception in the statute (Sec. 505, R. S. 1919) empowering women to dispose of property by will has no application. It applies to lands in which the husband has curtesy and not to those from which curtesy has been excluded. In order to sustain appellant's present contention it would be necessary, first, to assume that the title of testatrix was so taken that curtesy was not excluded. We do not think such an assumption should be made against the will.

(2) In the second place, even if the assumption referred to could be made, it would not sustain appellant's position. Her contention is based upon a misconception of the rule concerning the invalidation of wills by mistake.

"Where a testator, in addition to complete testamentary capacity, is in full enjoyment of average physical and educational faculties, it would seem that in the absence of fraud or of undue influence, a mistake, in order to defeat the probate of his entire will, must in substance or effect really amount to one of identity of the instrument executed; as, for instance, where two sisters, in one case, or a husband and wife, in another, prepared their respective wills for simultaneous execution, and through pure error one executed the other's, and vice versa. (Anon. 14 Jur. 402; Re Hunt, L. R. 3 P. & D. 250; Nelson v. McDonald, 61 Hun, (N. Y.) 406.) Short of this, however, or of something amounting, in effect, to the same thing, it is against sound public policy to permit a pure mistake to defeat the duly solemnized and completely competent testamentary act. It is more important that the probate of the wills of dead people be effectively shielded from the attacks of a multitude of fictitious mistakes than that it be purged of wills containing a few real ones. The latter a testator may, by due care, avoid in his life time. Against the former he would be helpless. . . .

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"Assuming that the lawyer's assurance that the . . . clause would permit the executors to pay over the entire income after the debts were satisfied, was intended and understood as legal advice upon the construction of this clause, and that it was legally unsound, . . . that, also, in the absence of fraud or undue influence, is insufficient to defeat probate of the will. It is no new thing for provisions in wills to turn out under the established rulings of the courts, to have a very different meaning from that which the testators themselves, under the honest but mistaken advice of counsel, thought they had when the wills were executed, but this has never been a ground for refusing probate." [In re Gluckman's Will, 87 N. J. Eq. l. c. 641, et. seq.]

"If being of sufficient mental capacity, and free from insane delusion or undue influence, he executed the instrument with a knowledge of its nature and contents, and intending that it should be his last will, its admission to probate cannot be opposed by evidence that he did not understand the legal effect of all its provisions, or truly appreciate the proportions in which his property would be thereby distributed. To allow this to be done would be to defeat, by evidence of the most unsatisfactory and untrustworthy character, an instrument voluntarily executed by a competent testator with all the forms and solemnities which the statute makes essential to the validity of a testamentary disposition." [Barker v. Comins, 110 Mass. l. c. 488.]

"How often is it, that the words used by the scrivener convey a different estate from what the testator designed! Yet it has always been decided that parol testimony could not be admitted to prove that the devisor meant to give a different estate from what the will expressed." [Comstock v. Hadlyme, 8 Conn. l. c. 265.]

"No man knows, when he sits down to write a contract or to write his will, but that at the next law or chancery term, under the revised statutes concerning

intent, he may be stultified in respect to a matter concerning which he knew more and was better qualified to speak, and did speak better than all the world beside. Judging from what we have felt and heard in the course of this term, I am sure, if we impose an understanding of our new statutes in this branch of the law upon any one, as a condition to the making of a will, very few will succeed; and if we undertake to make new wills for every partial failure, while we embark in an interminable labor, I still fear we shall not be better testators than those who were more lawfully employed in disposing of their own estates." [Salmon v. Stuyvesant, 16 Wend. l. c. 332.]

In *Munnikhuysen v. Magraw*, 35 Md. l. c. 287, 288, it was said: If testatrix "knew and understood what the actual contents of the will were, that would be sufficient, although in point of fact she may have had some erroneous opinions with regard to their legal effect and operation. Sane persons, when they express themselves in writing, are presumed to mean what the writing imports, and it would be dangerous and in plain violation of the Statute of Frauds, to allow it to be impeached or overthrown by evidence *aliunde*, showing that they meant something else, or did not understand its true import and operation."

The fact that a testator does not appreciate the legal effect of language he voluntarily and intentionally uses does not defeat the will. [Re Carter, 42 Ont. L. 57.]

These excerpts disclose the rule and the reasons for it. The law does not require of every testator, upon pain of refusing his will probate, that he shall have perfect knowledge of the law of real and personal property.

Appellant relies upon *Cowan v. Shaver*, 197 Mo. 203, and *Bradford v. Blossom*, 207 Mo. 177. In the *Cowan* case there was evidence of impaired mental capacity, undue influence and a fraudulent conspiracy to procure the drafting and execution of a will different from that desired by the testator and different from the provisions

he was caused to think it contained when he signed it. In the Bradford case the confidential agent of testatrix procured the will to be drafted in violation of instructions given by testatrix and then induced her to execute it under the belief that it contained the provisions she directed to be put in it. In that case this court approved (but held inapplicable) a rule laid down in *Couch v. Eastham*, 27 W. Va. l. c. 805, as follows: "The mistake which will avail to set aside a will, is a mistake as to what it contains, or as to the paper itself, not a mistake either of law or fact in the mind of the testator, as to the effect of what he actually and intentionally did." This is more applicable to the case at bar. The principle of the decisions from which we have quoted applies here, and appellant's position is untenable for this reason also.

IV. The objections made to the answer overlook Section 525, Revised Statutes 1919. The judgment is affirmed. All concur.

SOPHIA MARLEY, Appellant, v. NORMAN'S LAND
& MANUFACTURING COMPANY, No. 21,514.

SOPHIA MARLEY v. NORMAN'S LAND & MANU-
FACTURING COMPANY, Appellant—No. 21,513.

Division One, July 11, 1921.

1. **JUDGMENT: Procured by Fraud: Knowledge of Suit Pending.** A plaintiff should be held responsible for any fraud in law, fraud in fact, deception or mishap, which was occasioned by his acts or the acts of his counsel. Where a plaintiff employed one attorney to bring suit by personal service against a non-resident and another attorney to bring suit by publication for the same land in the same court at the same term and the order of publication was published in an obscure paper away from the county-seat, and to the first suit the defendant appeared, filed a motion requiring plaintiff to give bond for costs, which being sustained and no

bond being filed, the suit was dismissed, the judgment rendered by default in the second suit, the defendant having no knowledge thereof, should be set aside at the suit of said defendant or his grantee. Although the attorney in the one suit knew nothing about the other suit having been brought, the plaintiff in both must be held responsible for everything either of them knew, for in law he knew whatever they knew, and his act was not only a fraud upon the defendant, and tricked him out of his defense to the second suit, but was a fraud upon the court who rendered the default judgment therein.

2. **CONVEYANCE: Patent Clerical Error: Recognition in Suit to Quiet Title: Omission of Word Quarter.** The recognition of a patent clerical error or omission in the construction of a deed is not a reformation of it; and where the judgment in a tax suit properly described the land as the southwest quarter and the northeast quarter of Section 36, and the sheriff's deed recites that the judgment described the southwest quarter and the northeast quarter of Section 36, and then says that named persons were the highest bidders for the "southwest quarter and northeast of Section 36" and that said last above described tracts were stricken off and sold to said named persons, it is clear that the omission of the word "quarter" after the word "northeast" was a patent clerical error, and that said deed, when read as a whole, conveyed 320 acres to said purchasers; and their subsequent grantee, in his suit to quiet title, is, without bringing suit in equity to reform the deed, entitled to judgment for the 320 acres, and not simply to 160, as the trial court ruled.
3. **TAX SUIT: Trust Estate: Sale of Legal Estate.** Where the will, fairly construed, contemplated that the executors should divide the property between the widow and two sons, and that one of the sons should hold his brother's share until he became of age; there is nothing to show when said brother became of age; the will does not show when it was made; the testator died in 1883 and the administration of the estate closed in 1887; in 1891, after the death of the wife, suit for taxes was brought against both brothers, they were personally served, and in their answers asserted they were the owners of the land, and made no claim to a trust estate, it will be *held*, in a suit to quiet title, that the title passed to the purchaser at the sheriff's sale under the tax judgment, and that a subsequent purchaser from said brothers took nothing by his deeds.
4. ———: ———: **Estoppel.** Defendants in a tax suit, after filing their answer in which they assert they are the owners, will not be heard, on the ground of estoppel, to urge that the judgment in the tax suit was void and did not bind them because the prop-

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erty was held by one of them as trustee for the other. Inconsistent positions cannot be taken where they work injury, and the purchasers at the tax sale had a right to rely upon defendant's answer filed in the tax suit, in which they alleged they were the owners. And a subsequent purchaser from said defendants stands in no better position than they do.

Appeal from Scott Circuit Court.—*Hon. Frank Kelly*, Judge.

REVERSED AND REMANDED (*with directions*).

Oliver & Oliver and Gullivan & Finch for plaintiff.

(1) The suit for taxes against August J. Weil and Henry G. Weil and the unknown heirs of Joseph Weil, deceased, was against the proper parties, and, therefore, sale under said judgment conveyed title. Sec. 12945, R. S. 1919; *Vance v. Corrigan*, 78 Mo. 94; *State ex rel. Hunt v. Sack*, 79 Mo. 661; *Gitchell v. Kreidler*, 84 Mo. 472; *Keaton v. Jorndt*, 220 Mo. 117. (2) The will of Joseph Weil, not having been probated in Stoddard County, did not impart notice until it was recorded there in 1905 *Graves v. Ewart*, 99 Mo. 17; *Rodney v. McLaughlin*, 97 Mo. 426; *Kieth v. Kieth*, 97 Mo. 223; *Rodney v. Landau*, 104 Mo. 260. (3) The acts and conduct of Norman and his attorneys, as well as the result thereof, was a fraud upon the court and fraud in the concoction of the judgment. *Lee v. Herman*, 84 Mo. App. 157; *Wonderly v. Lafayette County*, 150 Mo. 635; *Tapana v. Shaffray*, 97 Mo. App. 337; *Smoot v. Judd*, 161 Mo. 673; *Bresnehan v. Price*, 57 Mo. 422; *Howard v. Scott*, 225 Mo. 685; *Ramsey v. Hicks*, 53 Mo. 190; *Irvine v. Lehy*, 102 Mo. 204. (4) The sheriff's deed under the tax judgment conveyed the three hundred and twenty acres, as the abbreviated description is good and sufficient. Sec. 12968, R. S. 1919; *State ex rel. v. Vaile*, 122 Mo. 48. (5) August J. Weil and Henry G. Weil, having been personally served in the tax suit, and having filed answer

pleading title in themselves, would be estopped from setting up any different claim of title against the purchaser at the tax sale and the defendant claiming under them by deeds made in 1905 is in no better position. *Nave v. Todd*, 83 Mo. 601; *Koney v. Laird*, 153 Mo. 408; 16 Cyc. 799; *Austin v. Loring*, 63 Mo. 19; *Proctor v. Nance*, 220 Mo. 104.

J. L. Fort and *B. C. Hardesty* for defendant.

(1) Defendant has the record title independent of the decree of September 22, 1910, which plaintiff seeks to cancel. *Donaldson v. Allen*, 182 Mo. 626; *Hazel v. Hagen*, 47 Mo. 277; *Ebey v. Adams*, 10 L. R. A. 162; 39 Cyc. 99, 102. (2) Defendant also has title under said decree, because no actual fraud exists as a basis for setting aside the same. (a) The evidence, instead of showing actual fraud as a basis for setting aside said decree, shows Norman's good faith throughout. *Rodan v. Transit Co.*, 207 Mo. 408. (b) The very acts Norman is charged with rebut the charge of fraud, for they comport better with the theory of fair dealing than with fraud. *Ames v. Gilmore*, 59 Mo. 537; *Redpath v. Lawrence*, 48 Mo. App. 427; *Andrews v. Linebaugh*, 260 Mo. 623. (3) Defendant has title under said decree, because no constructive fraud exists as a basis for setting aside that decree. (a) Constructive fraud cannot be founded upon acts that are of a perfectly legal character. *Hobgood v. Ehlen*, 141 N. C. 344; *Nations v. Pulse*, 175 Mo. 93; *Bank of Versailles v. Guthrey*, 127 Mo. 193; *Barr v. Cabbage*, 52 Mo. 404; *Steward v. Severance*, 43 Mo. 322. (b) Norman was under no legal obligation to give personal notice to Marley. *Huiscamp v. Miller*, 220 Mo. 135. (c) Norman is chargeable with no act of commission or omission which can be considered the proximate cause of Marley's failure to obtain notice of the publication suit. *Snyder v. Free*, 114 Mo. 376; R. S. 1909, secs. 2102, 2103; *Travelers' Prot.*

Assn. v Gilbert, 55 L. R. A. 542, 543; Lieber v. Lieber, 239 Mo. 1; See v. Harmon, 84 Mo. App. 157; Tapanan v. Shaffray, 97 Mo. App. 345; Sanderson v. Voelcker, 51 Mo. App. 332; 23 Cyc. 936, note 77. (d) The real proximate cause of the defendant's failure to learn of the pendency of the suit or the rendition of the judgment is the legal negligence with which defendant is chargeable. Richardson v. Howard, 158 Pac. 877; R. S. 1909, sec. 2103; Bunn v. Lindsay, 95 Mo. 260; Burnham v. Clark, 232 Mo. 657. (4) The plaintiff appealed from the court's award of a part of the land to defendant, but that action of the court is correct and should be sustained. DePaige v. Douglas, 234 Mo. 78; Dixon v. Hunter, 204 Mo. 387.

GRAVES, J.—Plaintiff's action is one to set aside a judgment of the Circuit Court of Stoddard County, Missouri, in so far as such judgment effects James Marley and the land involved in this suit. The judgment sought to be so cancelled was one entered on the 22nd day of September, 1910, in the case of W. W. Norman v. Jefferson J. Green et al. The Norman suit, *supra*, was an action to quiet title to two thousand acres or more of land, including the three hundred and twenty acres involved in the case now before us. It was against divers parties (including James A. Marley), if living, and against their heirs and devisees, if dead. Marley claimed to own three hundred and twenty acres of land here involved, and was a party to this blanket suit where all claimants were being jointly sued, whether they claimed an interest in the whole amount of land stated in the petition or not. This Norman suit was filed January 25, 1910, and judgment entered on September 22, 1910, as stated above. The judgment was on service by publication. The plaintiff in the present action is the *mesne* grantee of James A. Marley, and the defendant is the immediate grantee of W. W. Norman. The petition is in two counts, and as we gather it the first count is based upon a charge of actual fraud in the pro-

curement of the judgment, whilst the second count might be said to be broad enough to cover constructive fraud, mistake and deception, through which James A. Marley was prevented from defending that action.

In 1905 James A. Marley placed of record in Stoddard County, Missouri, a deed which purported to convey to him the land in suit. In 1906, W. W. Norman brought a suit against Marley to quiet title to this land, in Stoddard County Circuit Court. The suit was by publication. Marley heard of it, and arranged with counsel to defend his title. The case went by change of venue to St. Genevieve County, where it was disposed of in 1909, by plaintiff taking a nonsuit after the trial court had indicated adverse action to him. I. R. Kelso was counsel for Norman in this case, and it is shown that he agreed to reinstitute the suit against Marley within a year. The suit begun in 1906 we shall call Suit No. 1. The one brought January 25, 1910, we shall call Suit No. 2.

With the Suit No. 2 pending, Mr. Kelso, as attorney for W. W. Norman, on February 3, 1910, brought Suit No. 3, and had a summons sent to Marley's home in Illinois, and there served upon him. Suit No. 2 was brought by Judge Green, as attorney for Norman, and at Norman's direction the notice of publication was run in a paper of limited circulation printed and published in a small town some distance from the county seat. Suits No. 3 and No. 2 were returnable to the same term of the Stoddard County Circuit Court. Marley having actual notice of Suit No. 3 came to Missouri and appeared in defense of that suit. Marley filed a motion for a cost bond in said action on September 12, 1910, ten days prior to the decree in Suit No. 2. Said motion for cost bond was continued to March term, 1911, and on the 22nd day of March Norman dismissed the cause.

Both counts of the petition in the instant case contained a prayer not only for the cancellation of the judgment of September 22, 1910, but also for the determining

of title. The court granted plaintiff leave to strike out those portions of the prayers with reference to the adjudgment of title, and granted defendant leave to amend its answer so as to ask for the adjudication of title. Both parties put in their chain of title to the three hundred and twenty acres of land. The trial court found against plaintiff on the first count of the petition, and for her on the second count, and set aside the judgment of September 22, 1910, but on the respective claims of title decreed title in plaintiff for one hundred and sixty acres of the land and for defendant for the other one hundred and sixty acres. From such judgment both sides have appealed. Details of both pleadings and evidence are left to the opinion.

I. If the trial court erred in setting aside the judgment of September 22, 1910, we have the end to plaintiff's case. This judgment is a blot upon her title, so long as it stands. This, because it divested
Fraudulent James A. Marley of title, and decreed title
Judgment. in W. W. Norman, who conveyed to defendant. The trial court in its decree said:

"On the second count of the petition, as amended, the court finds that by reason of mistake, error and combination of facts and circumstances of the two suits against plaintiff in the Stoddard County Circuit Court, she was misled, deceived and prevented from contesting her title to the lands involved, and that the order, judgment and decree of this court should be that the decree of the Stoddard County Circuit Court bearing date September 22, 1910, decreeing the title in defendant, should be cancelled, annulled and for naught held."

To get at the facts a little more fully it should be said that James A. Marley claimed to have acquired title to these lands October 2, 1905, and his deed was recorded December 26, 1905. He, as well as plaintiff, resided in Illinois. James A. conveyed to W. H. Marley, August 22, 1911, but the deed was not recorded until August 30, 1915.

By the will of W. H. Marley, probated in Edgar County, Illinois, the title passed in December, 1913, to the plaintiff. The will, together with its probate, were later (in 1916) filed for record in Stoddard County. Case No. 1 of the line of cases involved here, was a suit by Norman against James A. Marley, and covered only the land in suit. It was finally dismissed in 1909, under the circumstances indicated in our statement.

The present plaintiff is the mother of James A., as we gather from the record. From 1906 on, these two have paid the taxes on the land. It stands admitted that neither the defendant nor its grantors had paid any taxes thereon for a period of thirty-one years.

Mr. Norman explains the suits Nos. 2 and 3, by saying that he had written Mr. Kelso about re-instituting the suit which was dismissed in 1909, but had received no answer, and that he got Judge Green to bring No. 2, the omnibus suit, in which the name of James A. Marley appeared about the middle of a long list of defendants, and Marley's three-hundred and twenty acres described with several thousand acres of other land scattered over the county. Norman knew, in law, if not in fact, of both these suits being brought, because the law required him to know the acts of his agent and attorney Kelso, who brought Suit No. 3. In law he knew just what Kelso knew, and if he did, he knew that Marley had been sued by personal service, and only on the three-hundred and twenty acres of land owned by him. He knew in fact all that was done in Case No. 2, and the form of that petition. He had the usual knowledge that publications are not often seen by non-residents, and he knew of Marley's non-residence. He further knew that Marley, having been sued by personal service, would not likely suspect another suit by publication against him. The whole transaction, from the beginning to the end, was the handiwork of Norman and his own agents, and Norman should be responsible for any fraud in law, fraud in fact, deception, or mishap, which was occasioned by his acts

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or the acts of his counsel. Of course the two lawyers are blameless, because neither knew what the other was doing, but this cannot be said of Norman. His acts put the whole chain of circumstances in motion, and whilst the trial court may have been right in saying that there was no actual fraud, a matter we need not and do not pass upon, yet it was clearly right in holding, in substance, that the things done by Norman and his agents and attorneys worked a fraud upon Marley, through which he (without relief from a court of equity) would lose title to the land, if such he had. The fact that Marley was sued in Case No. 3, and personally served, was well calculated to prevent him and his counsel from scrutinizing the county papers for another suit by publication in which his land might be included. Marley not only had counsel looking after his title from 1906 on up to 1911, when Case No. 3 was dismissed, but during these years he took the leading county seat paper, in order to keep advised. Norman is responsible for Suit No. 3, because he had directed his counsel Kelso to reinstate the suit dismissed in 1909, Suit No. 1. If this act tended to abate the vigilance of Marley, and tricked him out of a defense in Suit No. 2, it was not only a fraud upon Marley, but upon the court who rendered a default judgment in Case No. 2. This filing of a case and procuring personal service therein was well calculated to mislead Marley as to there being another action pending, and, as said, this was the act of Norman. What his agent and attorney did, in law and equity, he did, and if the act misled Marley, and tricked him out of a defense in Case No. 2, then such fraud entered into the judgment herein sought to be set aside. [Wonderly v. Lafayette Co., 150 Mo. 1. c. 650; Howard v. Scott, 225 Mo. 1. c. 714.]

In the latter case, LAMM, J., said:

“But the doctrine has been uniformly laid down broadly as announced in *Wabash Railroad Co. v. Mirrieles*, *supra*, and the cases there collated and cited, to the effect that false swearing and false averments in plead-

ings do not give rise to an action in equity to set aside a judgment for fraud. Such, then, may be taken as accepted doctrine. There must be some fraud committed on the court itself in the procurement of the judgment, arising extrinsically or collaterally to the issue tried; *or on the party himself arising in the same way.*

“Nevertheless no court has undertaken to point out and define the particular frauds which will vitiate a judgment any more than it has to define fraud generally, and many cases attest the acute diligence of courts in classifying facts as extrinsic and collateral in order to save the administration of justice from the heavy reproach of enforcing an unconscionable advantage sounding in fraud in procuring a judgment. In *Wonderly v. Lafayette County*, supra, the scheme denounced there was said to be a ‘fraud on the court whose jurisdiction was betrayed *and a fraud on defendant who was tricked out of his defense.*’ That case illustrates the honorable sensitiveness of courts to frauds on their jurisdiction, and shows how shadowy, uncertain and somewhat arbitrary is the line between fraud in the procuring of the judgment as distinguished from fraud in the cause of action itself. In other cases judgments have been annulled because of tricks and deceptions whereby the court has been made an ‘instrument of injustice.’ [*Bresnehan v. Price*, 57 Mo. 422; *Lee v. Harmon*, 84 Mo. App. 157; *Clyce v. Anderson*, 49 Mo. 40; *Fitzpatrick v. Stevens*, 114 Mo. App. 497.]”

In Suit No. 3 Norman, through his counsel, had the motion for costs continued, and whilst this was pending, through other counsel took his judgment in Case No. 2. It makes no difference that Norman acted through different agents or attorneys. What they did he did, and his knowledge covered the whole chain of circumstances. If these acts of Norman prevented Marley from making a defense in Suit No. 2, it is sufficient in equity to defeat the judgment entered therein. There is no doubt that Norman directed Kelso to reinstitute the suit dismissed

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in St. Genevieve County. And as above suggested he must know the acts throughout, although done for him through different agents. The court was right in setting aside the judgment of September 22, 1910, because it stands admitted that the present defendant stands in the shoes of Norman. That is to say Norman was its president and chief stockholder at the date it took the deed, and Norman's knowledge was the corporation's knowledge.

II. Both parties presented to the court their respective chains of title. The two chains of title run the same up to a time (January 16, 1878) when the title passed to Joseph Weil. At this point the parties separate in a way. Joseph Weil lived in St. Louis, for many years. He died in 1883, leaving a will, which was duly probated. He left a wife and two sons, August J. Weil and Henry G. Weil, called in the will Harry Weil.

In 1891 a suit for taxes was brought by the County Collector of Stoddard County against August J. Weil, Henry G. Weil and the unknown heirs of Max Weil and Joseph Weil. August J. and Henry G. Weil were personally served with summons in this tax suit, and these two parties filed an answer in which they admitted the title to be in them, and then followed such admission with a general denial. The widow had died prior to 1890, according to the evidence of August J. Weil. The tax judgment went in due course, and the sale was made thereunder. The tax judgment properly describes the three hundred and twenty acres as the S. W. $\frac{1}{4}$ and N. E. $\frac{1}{4}$ of Sec. 36, Twp. 24, Range 12, E. There were other lands in the judgment, not of consequence here. The tax deed says (1) that the judgment described the S. W. $\frac{1}{4}$ and N. E. $\frac{1}{4}$ of Sec. 36, Twp. 24, Range 12, with other lands. (2) That O. C. Frisbee and James W. Buchanan were the highest bidders for: "Southwest quarter and northeast of Section Thirty-six (36), the west of section, southeast

quarter and south half of southwest quarter of northeast quarter, all in Section Thirty-two (32) in Township Twenty-four (24), north, of Range Twelve (12), east, for the price and sum of one hundred dollars." (3) "That said last above described tracts were stricken off and sold to O. C. Frisbee and James W. Buchanan;" and (4) that, "I, J. N. Patterson, Sheriff as aforesaid, do hereby assign, transfer and convey unto the said O. C. Frisbee and James W. Buchanan, all the above described real estate so stricken off and sold to O. C. Frisbee et al., that I might sell as Sheriff as aforesaid, by virtue of the aforesaid judgment, execution and notice."

So far as the land involved in this suit is concerned, the description of the land sold to Frisbee and Buchanan would be "Southwest quarter and northeast of Section Thirty-six (36) in Township Twenty-four (24) north, of Range Twelve (12), east." If the word "quarter" followed the word "northeast," as it does by figures and letters in the judgment and other parts of the deed, there would be a complete and good description of the three hundred and twenty acres involved here. It was by reason of the absence of the word "quarter" as above indicated that the trial court allowed to plaintiff only one hundred and sixty acres of the land, i. e. the southwest quarter of said section. This sheriff's deed must be construed as a whole. It first says that the judgment under which the sale was had properly described the property herein at issue. It then recites that the sheriff did "expose to sale at public auction, for ready money, the above described real-estate" which was properly and definitely described theretofore in the deed. Then follows the statement, which we have heretofore quoted. It is clear that the omission of the word "quarter" after the word "northeast" in the deed is a mere clerical error, and should be so considered in construing its effect, as a conveyance. When read as a whole we think this deed conveyed the whole three hundred and twenty acres to Frisbee and Buchanan, and plaintiff got what title they re-

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ceived through it. The recognition of a patent clerical error or omission in the construction of a deed is not a reformation of a sheriff's deed. We have ruled in Division Two that a sheriff's deed cannot be reformed in an action to quiet title. [Brannock v. McHenry, 252 Mo. 1. c. 10.] It is further stated in that case that the facts might be made to appear to the end that the court might stay the proceeding until a corrected deed was procured. Plaintiff asked for such stay in this case, but the request was refused. We would reverse and remand the case for this failure, if we thought a new deed was required. We think, as above indicated, that in construing this sheriff's deed we can consider the very patent omission of the word "quarter" as suggested above, and when so construed it calls for the whole three hundred and twenty acres of land.

III. The tax suit is a further storm center in the case. Defendant urges that under the will of Joseph Weil, August J. Weil was made a trustee for the wife, Regine, and the son Harry or Henry G. Weil. The wife and August J. were made executors, and the administration of the estate closed in 1887. This was before the tax suit, and the wife had died before the tax suit. What was held in trust for her passed to the two boys upon her death. The will gave to August J. the homestead in St. Louis, and described personal property to be held for the wife during life or widowhood. It then specified that the son Harry should have \$40,000 first, because August J. had been advanced that sum. It then provided that the remainder should be divided in three parts, one-third to go to August J. in trust for the mother, one-third to August J. absolutely, and the other third to Harry absolutely, but with the provision that, if at the time of the division Harry was under age, "I hereby direct that my son August J. Weil shall hold said one-third part as trustee for the use of the said Harry Weil until he shall have attained the age of twenty-one years," when it

should be turned over to him. There is also the following clause in the will:

"After the payment of my debts and of the said forty thousand dollars, I direct that all the residue of my estate of whatsoever nature and wheresoever the same may be situate, whether real, personal or mixed, not hereinbefore otherwise disposed of, shall be divided into three equal parts. If, in the judgment of my executors, it is necessary or desirable to sell any or all of my estate for the purpose of making such division, they are hereby empowered to make such sale or sales, and to execute to the purchaser or purchasers proper conveyances thereof."

The will fairly construed contemplated that the executors were to divide the property, and August J. Weil was to hold the brother's share until he became of age. There is nothing to show when Henry G. Weil became of age. Nor does the will show when it was written. For aught that appears in this record, Henry G. might have been of age when the father died. He was sued in 1891, for taxes, and filed an answer through attorneys. Both he and August J. then asserted that they were the owners of the land. No claim was made that there was a trust estate when this answer was filed. On the contrary, there was an express admission that these two parties were the owners of the land. Later in October, 1905, August J. Weil, as the sole surviving executor of the will of Joseph Weil, and he and his wife as individuals, made a deed to George Houck, Jr., and about the same time or a little before a deed from one Harry Weil was also made to George Houck, Jr. Under these deeds the defendant claims, and under them the court declared title to one hundred and sixty acres to be in defendant.

The defendant in this case stands in no better light than August J. Weil and Henry G. (Harry) Weil. [Proc-tor v. Nance, 220 Mo. 104, l. c. 116.]

If the two Weils were urging, after the filing of their answer, that the judgment did not bind them, because

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there was a trust estate, and the property was held by a trustee, they would not be heard on the ground of estoppel. [Proctor v. Nance, *supra*; Austin v. Loring, 63 Mo. 19; Coney v. Laird, 153 Mo. l. c. 435; 16 Cyc. 799.] Inconsistent positions cannot be taken, where they work injury. The purchasers at this tax sale had a right to rely upon the answer filed by the Weils.

With this view of the case we need not discuss the question as to whether or not there was, in fact, a personal trust created by the terms of the Joseph Weil will, which was not closed with the final settlement of the estate, in 1887, as urged by defendant.

The foregoing are the decisive points in this case. The defendant has insisted upon the adjudication of title under his answer, relying upon the foregoing matters. It is wrong in them all, and it follows that under the prayer of defendant's answer the trial court should have decreed the title to the full three hundred and twenty acres to be in plaintiff.

Judgment is reversed and cause remanded with directions to the circuit court to enter a judgment for plaintiff for all the land involved, in accordance with the views expressed in this opinion. All concur.

PORTER MATHEWS v. RICHARD M. O'DONNELL
and MICHAEL H. O'DONNELL, Appellants.

Division Two, July 19, 1921.

1. **CONVEYANCE: Acknowledgment of Married Woman: Statute of 1855.** Where the statute (R. S. 1855, ch. 32, sec. 39, p. 363) required that the certificate of acknowledgment of a married woman shall set forth "that she executed the same freely and without compulsion or undue influence of her husband," a certificate resiting that the married women "executed and delivered the said deed freely and without compulsion of their said respective husbands" is sufficient, without using the words "undue influence." The statute

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requires no more than a substantial compliance with its terms, and is satisfied if the free and unconstrained consent of the wife to the deed is obtained.

2. ———: **Description: Reference to Grantor's Deed.** A conveyance by two married women and their husbands of "our undivided interest in a fractional piece of land deeded to us" by their grantor, "it being a part of the S. W. $\frac{1}{2}$ of the S. W. of Sec. 5, Twp. 50, Range 29," is a sufficient description, if the description of the land "deeded" to them by their grantor is sufficient. The office of a description is not to identify the land, but to afford the means of identifying it, and when this is done the description is sufficient. Where the grantors convey land deeded to them by a certain grantor and his deed to them had identified the tract, the description is sufficient.
3. ———: ———: **Undivided Interest: Exclusive Possession of Grantee.** Where land had been conveyed to two married women, and they and their husbands conveyed "our undivided interests" therein, the meaning is clear enough. Especially where the grantee took and retained exclusive possession of the tract conveyed, for this itself cured any defect in the description.
4. ———: **To Woman and Her Children: Fee or Remainder: Cotenancy: Settlement.** A deed conveying certain land to "F. A. D. Mathews and all her children she has now or ever may have," with the *habendum* reading: "To have and to hold the same unto the said F. A. D. Mathews and her children as aforesaid and their heirs, but it is to be distinctly understood if the said F. A. D. Mathews may hereafter conclude to sell the above tract of land she is hereby empowered and authorized to do so by arranging it so that the proceeds of said land is to be laid out for other lands or property to be conveyed so as to put the right of title in the said F. A. D. Mathews and her children," did not convey the fee to said F. A. D. Mathews, but only a vendable life estate, with remainder in fee in her children, born and unborn. She and her children were not made tenants in common, for it is clear that the grantor did not intend that the children should take a present interest, for he does not name them, and says "all her children she has now, or may ever have;" but the grant, when read in connection with the *habendum*, manifests a settlement, with a life estate to the mother and the remainder in fee to her children.
5. **TAXES: Payment: Duty of Life Tenant: Duty of Life Tenant's Grantee.** The payment of taxes upon improved and productive land is a charge upon the life estate, and it is the duty of the owner of such estate, whether the life tenant or his grantee be the owner, to pay the taxes and protect the interest of the remaindermen.

6. **TAX SALE: Deed to Life Tenant.** The purchase of land at its sale for taxes, by the life tenant or by the life tenant's grantee, inures to the benefit of the remaindermen, and operates only as a payment of the taxes. Such purchaser occupies a fiduciary relation to the remaindermen, and is bound to exercise every reasonable precaution to preserve the property intact for transmission to them upon the termination of the life estate.
7. ———: ———: **Future Disposition: Purchaser With Notice: Deliberate Plan to Defraud Remaindermen.** Not only the life tenant who purchases land at a tax sale, but all persons who take title from him with notice of his violation of his fiduciary relation to the remaindermen, are trustees *ex maleficio*; and the record of title showing he had only a life estate is constructive notice to his grantee, and the tax deed informs such grantee that the life tenant had suffered the land to be sold for delinquent taxes which the law required him to pay. But the facts of this case show actual notice, and also a deliberate plan to deprive the remaindermen of their estate, by suit and sale for taxes.
8. **CONVEYANCE: Purchase from Fraudulent Grantor: Notice: Failure to Testify.** The burden of proving a bona-fide purchase from a fraudulent grantor is on the party pleading it, and to support the plea he must prove that he bought without notice, and paid the purchase money without notice. And failure of such purchaser to testify creates an inference that he refrained because the truth would not aid his contention, and of itself affords strong evidence of the fraud.
9. ———: **Married Woman's Deed: After-Acquired Interest.** Under the statute of 1855 (R. S. 1855, sec. 36, ch. 32, p. 363) the deed of a married woman who owned only a life interest in land did not pass her interests subsequently inherited from the remaindermen. Prior to the Married Woman's Act of 1889, only whatever interest a married woman had at the time was conveyed by her deed, whatever its form.
10. **LIMITATIONS: Life Estate: Trustees Ex Maleficio.** Remaindermen cannot come into court and recover possession of land before the termination of the life estate, and no statute of limitations, that for thirty years or any other, begins to run against them until the life estate is determined by the death of the life tenant. And where the purchaser from the life tenant is a grantee with notice and a trustee *ex maleficio*, the statute does not run in his favor.
11. **TAX SALE: Surplus Money Paid to Life Tenant: Order of Court. Estoppel.** Where the life tenant, occupying a fiduciary relation to the remaindermen and under obligation to protect their estate,

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caused or allowed a suit for taxes to be instituted for the purpose of covinously defeating their title, his motion, sustained by the court, directing the sheriff to pay over to him the surplus money in his hands arising from the tax sale, will not estop them from claiming title. Such payment bars a renewal of any claim to the surplus fund, but it was not *res adjudicata* as to the remaindermen's title.

Appeal from Jackson Circuit Court.—*Hon. Willard P. Hall*, Judge.

AFFIRMED.

Henry Lamm, John I. Williamson and A. N. Gossett for appellants.

(1) The sheriff's deed in the suit and under the judgment for the taxes and enforcing the lien thereof and the proceedings in such suit are regular and sufficient and are so predicated and recognized in the allegation of plaintiff's petitions, and conveyed to Matilda Kinney in such suit against all parties who could possibly be interested in the land including the present plaintiff and J. B. Kinney, who were personally served with summons therein. This placed upon the plaintiff the burden of showing and proving that the purchase by Matilda Kinney was not with her own money and for herself. Defendants afterwards acquired her title as innocent purchasers, through Joseph B. Kinney, who acquired by the mortgagee's sale all the land, and through Matilda Kinney, who acquired by the sheriff's tax judgment sale, Tract A and west eight acres of Tract B. This is a question of fact and was decided against the defendants in the court below against and contrary to the evidence as to whether Matilda Kinney was a mere straw representative of her son J. B. Kinney, purchaser at the mortgagee's sale. (a) Even if the purchase by Matilda Kinney was with the money of Joseph Kinney and for his use and benefit, or, even if Joseph B. Kinney purchased for the use and benefit of his

father, Joseph Kinney, the mortgagee (although there is no proof that either is so), and even if the purchase by Matilda Kinney was with the money for the use and benefit (also not proven) of Joseph B. Kinney, the purchaser at the mortgagee's sale, yet neither of these parties were under any obligation or duty as to Mrs. Mathews or any of her children to pay these taxes and hence such purchase at the Sheriff's sale cannot be considered the performance of any such duty or obligation. For the reasons: (b) Neither of the Kinneys was in possession of the land while these taxes from 1869 to 1878 were accruing. The case of *Kinney v. Mathews*, 69 Mo. 520, shows that the ejectment suit for possession was pending as late as April, 1879, and no writ could have been issued therein, and the testimony shows that James P. Mathews, the defendant in that ejectment suit, was in possession of the land and was not ousted, whether under a writ in that case or otherwise, until the year 1881. The tax suit was commenced February 4, 1880. There is no duty to pay taxes on a mortgagee of a life estate or a purchaser under such mortgage owing to the remainderman while such mortgagee or purchaser under him is not in possession and obtaining the fruits of the land. *Atkinson v. Dickson*, 89 Mo. 464; *Gaskins v. Blake*, 27 Miss. 675; *Lacy v. Davis*, 4 Mich. 140; *Barrett v. Amrein*, 36 Cal. 322; *Cox v. Gibson*, 27 Pa. St. 160; *Wright v. Sperry*, 21 Wis. 331, 25 Wis. 617; *Pickering v. Lomax*, 120 Ill. 289; *Waterson v. Devoe*, 18 Kan. 223; *Williams v. Townsend*, 31 N. Y. 411. (c) Mrs. Mathews was not a life tenant, nor was the mortgagee or purchaser at the mortgage sale a life tenant, for the reasons that any of the three instruments to Mrs. Mathews and her children born and to be born which conveyed any title, did not vest in her only a life estate, but did, insofar as they conveyed any title, give her either an estate in fee simple or an estate in common with her children then living, or to her and her children born and unborn, the estate

opening to let in children born after the delivery of such instruments, and all these children, including the plaintiff as tenants in common under the proof in this case, are long since barred by limitation. (d) Also, for the reason that Tract A was owned by Mrs. Mathews and Mrs. Cushenbury by conveyance to them from Roy, and was never conveyed to their father, Cogswell, by them, and hence the instrument purporting to be such deed to her and her children from Cogswell and wife, conveyed no title. This negatives the life estate idea as to this Tract A, and defendants through the mortgage and sale thereunder have acquired, as against Mrs. Mathews, under her mortgage, her fee simple title to a half interest derived from Roy, and by the Statute of Limitations and rule of laches against Mrs. Cushenbury her title to an entire half interest derived from Roy. If Mrs. Cushenbury's title is not so barred, that does not help out plaintiff. (2) The surplus proceeds of the sheriff's sale were properly adjudicated to Joseph B. Kinney in full, thereby establishing his previous ownership in fee simple to all the land, on his motion proper therefor. Notice of this motion was personally served on Mr. and Mrs. Mathews and two of the three then surviving children, Andrew R. and Mary E., and constructively on the other of such three surviving children, Porter H., plaintiff here. They were all the adults. At the trial of the case now before this court plaintiff himself offered in evidence these proceedings, defendants' answer alleging this fact as an estoppel. *Moran v. Getchell*, 97 Mo. 134. In Missouri, the tax lien foreclosure requires sale of the land itself as against all parties defendant. *Getchell v. Kriedler*, 84 Mo. 472; *Myers v. Bassett*, 84 Mo. 479; *Allen v. McCabe*, 94 Mo. 148; *Williams v. Hudson*, 93 Mo. 524. Therefore such adjudication of surplus proceeds is *res adjudicata* and a judgment concluding in any other suit between the same parties the ownership of the land which carried the right to such surplus proceeds, viz., adjudication of the

fee simple title to the lands from which they were made and represent, converted into money by the court. *Moran v. Getchel*, 97 Mo. 134; *Murphy v. DeFrance*, 101 Mo. 151; *Gibbs v. Southern*, 116 Mo. 204; *Ketchum v. Christian*, 128 Mo. 38; *Donnell v. Wright*, 147 Mo. 639. (3) The case of *Kinney v. Mathews*, 69 Mo. 520, was properly brought by Kinney, against James P. Mathews alone. He was the head of the family and at that time was entitled to the possession even if his wife had only a life estate; and likewise if she had the fee simple; and likewise as to her interest if she was a tenant in common with her children. He was the head of the family and in possession, and the only person denying such possession to Kinney, in that case, hence he was the only proper or necessary and was in fact the only defendant in that case. The report of this case was offered in evidence. It was therefore only necessary for the Supreme Court in that case to adjudge, and the only proposition covered by its judgment, was whether or not Kinney was entitled to the possession of the land against the sole defendant therein, and such proposition was decided by the Supreme Court to the effect that Kinney was entitled to such possession against such defendant. This was the gist and only matter decided or adjudged in that case, the other expressions and language in the opinion (which in the majority opinion is uncertain as to whether the instruments there in question vested in Mrs. Mathews a fee-tail with remainder to whomsoever at her death might be the heir or heirs of her body, actually turning out to be the respondent herein, or whether she took a life estate with remainder to her children) are wholly *dehors* to and beside the case, mere *obiter dicta*, and are not at all binding in the instant case or appeal. It is clear that such instruments as to such titles as they may have conveyed were not in such *obiter* remarks correctly interpreted, for the reason that clearly under the overwhelming weight of authorities such deeds conveyed

whatever title they did convey to Mrs. Mathews, either in fee simple for the entire estate, or else as tenant in common with her children in fee simple. We use the language "whatever title they may have conveyed" as to such instruments, for that we wish the court not to lose sight of our position that as to Tract A the deed from Cogswell to Mrs. Mathews and Mrs. Cushenbury conveyed nothing. The defendants' title thereto harks back to the fee simple estate conveyed by Roy to those two women, as well as being based upon the sheriff's deed in the tax suit, and also upon the propositions that, as to all the land actually conveyed, Mrs. Mathews took either the entire estate in fee simple or else as tenant in common with her children. The husband was the only proper defendant in this ejectment case, before enactment of Sec. 6868, R. S. 1889. *Flesh v. Lindsay*, 115 Mo. 1, 13; *Evans v. Kunze*, 128 Mo. 670, 679; *Hall v. French*, 165 Mo. 340; *Graham v. Ketchum*, 192 Mo. 115; *Dilberger v. Wrisberg*, 10 Mo. App. 465; *Getchell v. Messmer*, 14 Mo. App. 83. (4) The omission of the words "or undue influence" necessary under the statute then in force to be stated by the officer in the certificate of acknowledgment to the instrument purporting to be a deed from Mrs. Cushenbury and husband and Mrs. Mathews and husband to William Cogswell, rendered such instrument futile and void as a deed. So that it passed no title to William Cogswell for this Tract A, being originally the 38.93 acres in S. W. fractional $\frac{1}{4}$ of Section 5. The evidence shows conclusively the land was patented to and owned by Joseph Roy, who on Aug. 21, 1847, conveyed the same in fee simple to Mrs. Cushenbury, then Robinson, and to Mrs. Mathews, then Cogswell. Therefore they so owned this land and the attempted deed to Cogswell by them, conveyed nothing and Cogswell's deed to Mrs. Mathews and her children did not affect the title to this tract of the lands in question. The fee simple title has passed to the defendants through the mortgagees' sale, reinforced by the

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sheriff's tax sale and deeds thereunder, and by the Statute of Limitations and the rule of laches. Secs. 38 and 39, ch. 32, p. 363, R. S. 1855; Chauvin v. Wagner, 18 Mo. 531; Rogers v. Woody, 23 Mo. 548; Wannell v. Kem, 57 Mo. 482; Krieger v. Crocker, 118 Mo. 531; Sarazin v. Railway Co., 153 Mo. 479; Powell v. Bowen, 297 Mo. 288; Bennett v. Ward, 272 Mo. 680; Dingman v. Romaine, 141 Mo. 466. This instrument, Mathews and Cushenbury to Cogswell, is also void for insufficiency and lack of description as to Tract A. Clements v. Randall, 34 Mo. 579; Holme v. Strantham, 35 Mo. 293; Jones v. Carter, 56 Mo. 403. (5) The record and evidence in this case shows conclusively that Mary E. O'Donnell and the four O'Donnell brothers and the two of them who are defendants have successively been in the exclusive, continuous, open, notorious, uninterrupted and visible possession of this land since the latter part of 1882, claiming to own the same against the entire world, and especially against the plaintiff and those under whom he claims, and unless Mrs. Mathews (who died in 1915) by the instruments in question had only a life estate in the land, and unless Joseph B. Kinney never had any more than a life estate in the land, then all possible title and estate of the plaintiff has long since been barred by the Statute of Limitations. Every claimant adverse to the O'Donnells was *sui juris*, from the time they became adults except Mrs. Mathews, and she from 1898. Warfield v. Lindell, 38 Mo. 561; LaPeyre v. Paul, 47 Mo. 586; Long v. Stapp, 49 Mo. 506; Miller v. Bledsoe, 61 Mo. 96, confirmed at pp. 248 and 444; Miller v. Early, 64 Mo. 478; Hutson v. Hutson, 139 Mo. 229; Whitaker v. Whitaker, 157 Mo. 342; Boyce v. Ry. Co., 168 Mo. 593; Hendrix v. Musgrove, 183 Mo. 300. (6) Even if the defendants' title depended solely upon the three instruments reading substantially in the granting clause "to the said Fanny D. Mathews and all her children she has now or will have" and in the *habendum* clause reading "to have and to hold the same unto

the said Fanny A. D. Mathews and her children as aforesaid and their heirs," the defendants still have good fee simple title as against the plaintiff. (a) Such deeds conveyed the fee simple title to Mrs. Mathews. *Rines v. Mansfield*, 96 Mo. 394; *Tygard v. Hartwell*, 204 Mo. 200; Judge Henry's dissenting opinion, *Kinny v. Mathews*, 69 Mo. 528. The intent to cut down what appears an absolute grant or devise must appear in the plainest language before such intent can take effect. The so-called power of sale to Mrs. Mathews in these instruments is not at all inconsistent with the fee simple estate created either entire or as tenant in common. *English v. Bechle*, 32 Mo. 186; *Lemp v. Lemp*, 264 Mo. 533. (b) If such deeds did not convey the fee simple title to her, they clearly at least conveyed the fee simple estate to her and her children born, or to her and them and those then yet to be born as tenants in common, the estate opening to let in each unborn child, and such deeds as were effective did not convey, at all events, merely a life estate to Mrs. Mathews. *Hamilton v. Pitcher*, 53 Mo. 334; *Allen v. Claybrook*, 58 Mo. 124; *Hall v. Stevens*, 65 Mo. 670; *Waddell v. Waddell*, 99 Mo. 338; *Dietz v. Siebert*, 157 Mo. 257; *Doerner v. Doerner*, 161 Mo. 399; *O'Day v. Meadows*, 194 Mo. 588; *Buckner v. Buckner*, 255 Mo. 371, 377; *Barkhoefer v. Barkhoefer*, 204 S. W. 906; Sec. 9, ch. 32, p. 356, R. S. 1855; Sec. 2271, R. S. 1919; *Oates v. Jackson*, 2 Strange, 1174; *Mason v. Clark*, 17 Beav. 131; *Wildes Case*, 2 Coke, 17, 3 Coke, pr. 6, 17; *Nimmo v. Stewart*, 21 Ala. 682; *Moore v. Lee*, 105 Ala. 493; *Est. of Daniel Utz*, 43 Cal. 200; *Pierce v. Brooks*, 42 Ga. 425; *Jackson v. Coggin*, 29 Ga. 403; *Loyless v. Blackshear*, 43 Ga. 327; *Plant v. Plant*, 122 Ga. 763; *Faloon v. Simhouser*, 130 Ill. 649; *Gill v. Logan*, 50 Ky. 231; *Bullock v. Caldwell*, 81 Ky. 566; *Bradham v. Day*, 75 Miss. 923; *Millecamp v. Millecamp*, 25 S. C. 125; *Sease v. Sease*, 64 S. C. 216; *Reeves v. Cook*, 71 S. C. 275; *Wallace v. Hodges*, 160 Ala. 276; *Stiles v. Cummings*, 122 Ga. 635; *Hancock v. Martin*, 147 Ga. 828; *King v. Rea*, 56 Ind. 1; *Chenery v. Stevens*, 97

Mass. 77; Dorden v. Timberlake, 139 N. C. 181; Cullens v. Cullens, 161 N. C. 344. (c) The statute in effect at that time, as now, authorized the granting of an estate to commence *in futuro* either by will or deed. As to the then living children, they could take as tenants in common beyond question, and as to those to be born, the estate could be created to commence *in futuro*, the mother and other children taking the entire estate with the quality of opening to let in the after born children. This statute seems to have been overlooked in the case of Kinney v. Mathews, 69 Mo. 520. Sec. 9, ch. 32, p. 356, Vol. 1, R. S. 1855; Sec. 4596, R. S. 1899; Sec. 2876, R. S. 1909 Sec. 4596, R. S. 1899; Sec. 2271, R. S. 1919; O'Day v. Meadows, 194 Mo. 588; Buxton v. Krueger, 219 Mo. 225. (d) The decision in Kinney v. Mathews, 69 Mo. 520, is not the law of the present case. It was an action of ejectment. It is not the same case or appeal in the same case. The facts are different. Buxton v. Krueger, 219 Mo. 239; State ex rel. v. Eastin, 270 Mo. 209. (1) The mortgage from Mrs. Mathews, joined in by her husband, to Joseph Kinney, dated July 14, 1866, as to any of these lands of which she owned the entire fee simple estate, passed that title, and as to any of it she owned in only an undivided interest as tenant in common or by inheritance from her then deceased children, such mortgage passed that title, beyond question. And as to any interest she may have inherited from her subsequently deceased children, such mortgage passed that title, notwithstanding the statute then in effect providing that covenants of warranty should not be binding upon a married woman. Such after acquired title would pass by virtue of a different statute likewise then in effect providing that if any person should convey lands by a deed purporting to convey a greater estate than the grantor then owned, any title which the grantor might thereafter acquire would inure to the benefit of the grantee and pass by virtue of such deed to the grantee. Sec. 36, ch. 32, p. 363, R. S. 1855;

Sec. 2788, R. S. 1909; Sec. 2175, R. S. 1919; Sec. 3, ch. 32, p. 355, R. S. 1855; Sec. 3940, R. S. 1879; Sec. 8835, R. S. 1899; Sec. 4591, R. S. 1899; Sec. 2871, R. S. 1909; Sec. 2266, R. S. 1919; Evens v. Labadie, 10 Mo. 430; Ivy v. Yancy, 129 Mo. 509; Contra Bradford v. Wolf, 103 Mo. 391; Hendrix v. Musgrove, 183 Mo. 300. That one action of ejectment and judgment is not *res adjudicata* in another action of ejectment or in a real action for determination of title, although the title, parties and facts are exactly the same. In addition to cases cited, the following are in point: Dunn v. Miller, 75 Mo. 620; Spencer v. O'Neill, 100 Mo. 49; Speed v. Railway Co., 163 Mo. 122. Except in cases where an equitable title count is set up preliminary to an ejectment count in same suit, or equitable title set up in defense and adjudicated, in which case the decree and judgment are equivalent to a decree on a bill *quia timet* after two recoveries in ejectment. Sutton v. Donovan, 100 Mo. 141; Bailey v. Winn, 101 Mo. 649; Swope v. Walker, 119 Mo. 556.

W. C. Hock and L. T. Dryden for respondent.

(1) The deeds in question, two from Wm. Cogswell and wife to their daughter, Fanny A. D. Mathews and all her children she has now or may ever have, and a similar deed to the same grantee from Celia F. Cushenbury and husband, conveyed a life estate to Fanny A. D. Mathews, with remainder to her children. Kinney v. Mathews, 69 Mo. 520; Tygard v. Hartwell, 204 Mo. 206; Garrett v. Wiltse, 252 Mo. 711; 13 Cyc. 685. (2) In construing a deed, the intention of parties should be ascertained and carried into effect. 18 Corpus Juris, p. 252, and p. 305, sec. 283; Eckle v. Ryland, 256 Mo. 424; Garrett v. Wiltse, 252 Mo. 699; Belch v. Miller, 32 Mo. App. 387; 17 Am. & Eng. Ency. Law (2 Ed.) 21; Warne v. Sorge, 170 Mo. 167. (3) The trial court correctly

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held the tax deed in question void. *Black on Tax Deeds*, p. 337, sec. 273; *Peak, v. Peak*, 228 Mo. 536, 552; *Blair v. Johnson*, 215 Ill. 552; *First Congregational Church v. Terry*, 130 Iowa, 513; *Connecticut Mutual Life Ins. Co. v. Smith*, 117 Mo. 261, 292; *Sec. 2810, R. S. 1909*; *Pruitt v. Hally*, 73 Ala. 369; *Tiffany on Real Property* (2 Ed.), p. 86; *Olleman v. Kelgore*, 52 Iowa, 38; *Howell v. Jump*, 140 Mo. 441; *Wiswell v. Simmons*, 77 Kan. 622; *Phe-lan v. Boyland*, 25 Wis. 679; *Defreese v. Lake*, 109 Mich. 679. (4) The deed from William Cogswell and wife and D. Cushenbury and wife to Fannie A. D. Mathews (Tract A) was good. (a) The description was sufficient. 1st *Corpus Juris*, pp. 291, 292, 180; *Bollinger v. McDowell*, 99 Mo. 632; *Means v. LaVergne*, 50 Mo. 343; *Nelson v. Broadhack*, 44 Mo. 596, 603; *Clamorgan v. Beden*, *St. Louis Railroad Co.*, 72 Mo. 139; *Whitwell v. Spiker*, 238 Mo. 629. (b) The acknowledgment was a substantial compliance with the statutes and therefore good. *Bohen v. Casey*, 5 Mo. App. 101, 110; *Ray v. Couch*, 10 Mo. App. 324; *Alexander v. Merry*, 9 Mo. 514; *Gross v. Watts*, 206 Mo. 373; *Huse v. Ames*, 104 Mo. 91; *Hughes v. McDivitt*, 102 Mo. 77. (5) The respondent is not barred by the Statutes of Limitations or adverse possession. *Hall v. French*, 165 Mo. 430; *Bone v. Ty-nell*, 113 Mo. 182; *Howell v. Jump*, 140 Mo. 457; *Dan-ciger v. Stone*, 278 Mo. 19, 27; *Coulson v. La Plant*, 196 S. W. 1147. (6) The interest inherited by respondent's mother from deceased children subsequent to the execution of the mortgage, did not pass under her warranty contained in the mortgage, she being a married woman and not bound by her warranty nor estoppel. *Hendricks v. Musgrove*, 183 Mo. 309; *Ford v. Unity Church Society*, 120 Mo. 498; *Bradford v. Wolfe*, 103 Mo. 391.

HIGBEE, P. J.—Appellants have summarized the pleadings and evidence substantially as follows:

This is an appeal from a decree of the circuit court in a suit to determine title to lands. The first count of

the amended petition was in ejectment, which plaintiff dismissed at the trial. The second count is in equity and alleges that plaintiff is the owner of the lands in question, consisting of three adjoining tracts; that defendants are in possession and claim title thereto against plaintiff. It particularly alleges that one Joseph B. Kinney, in 1871, became the owner of an estate therein for the life of Fannie A. D. Mathews, and as such owner it was his duty to pay the taxes on the land, but in violation of said duty, and with the intent of acquiring the estate of the owners of the remainder in fee of said property, neglected to pay said taxes and permitted them to become delinquent. Judgment was obtained by the State for said delinquent taxes, and sale made thereunder, and at such sale said Joseph B. Kinney bid in a part of these lands and caused a sheriff's deed thereto to be made to his mother Matilda Kinney, thereby attempting to acquire the remainder estates against plaintiff. The defendants claim ownership under deeds made by said Joseph B. Kinney and his mother, Matilda, and had knowledge before the execution of such deeds of "the facts and circumstances herein recited."

The prayer is that the court set aside and hold for naught said sheriff's deed, and to determine title, and for all proper relief, as provided by Section 1970, Revised Statutes 1919.

To the second count defendants answered, admitting possession and denying any ownership in plaintiff; admitting that Matilda Kinney acquired title to a part of the land by virtue of a sale in a suit for taxes, but that defendants acquired such tax title as innocent purchasers for value without knowledge of any defect in her title; pleading the ten-year, twenty-four year and the thirty-year limitation, and payment of taxes therefor by defendants, and failure of plaintiff to pay any such; valuable improvements as occupying claimant; pleading also that the surplus money proceeds of the tax-suit sale of the land was claimed by Joseph B. Kin-

ney, and that plaintiff was estopped by that suit and proceeding from claiming title to these lands; laches on the part of plaintiff; and praying that the court decree defendants to be the fee-simple owners of the lands in question.

The cause was heard by the court at the September term, 1917, and taken under advisement. At the September term, 1919, judgment was rendered setting aside and holding void the sheriff's deed on the tax-judgment sale, and adjudging the plaintiff to be the owner in fee of and entitled to the possession of 5214/6300 undivided part of two tracts of land, one originally containing 101.60 acres and the other 38.93 acres, and 5214/6300 of an undivided one-half of another tract of $4\frac{2}{3}$ acres, all in Township 50, Range 29, Jackson County.

The tract described in the petition and judgment as the southwest fractional part of the southwest quarter of Section 5, originally containing 38.93 acres, appellants designate as "Tract A," and that described as all of the southeast fractional quarter of Section 6, originally containing 101.60 acres, as "Tract B," and that described by metes and bounds, containing $4\frac{2}{3}$ acres, as "Tract C." This tract adjoins Tract B at the northwest corner. (Mrs. Mathews also owned an undivided one-half in fee of Tract C at the time the mortgage, at number 12 of the abstract of title *infra*, was executed.)

The lands sold in the proceeding for delinquent taxes are Tract A and the west eight acres of Tract B. The Missouri River is the northern boundary of each tract.

The abstract of title shows the following transfers:

TRACT A:

1. Sept. 7, 1838. Patent, U. S. to Joseph Roy.
2. Aug. 21, 1847. Warranty deed recorded Book M, page 411, Joseph Roy and wife to Celia F. Robinson (afterward Cushenbury) and Fannie A. D. Cogswell (afterward Mathews, mother of plaintiff).

3. June, 1856. Warranty deed, Book Y, page 529, Fannie A. D. Mathews and husband, James P., and Celia F. Cushenbury and husband, D. Cushenbury, to William Cogswell; the exact wording of the description being as follows:

"Also our undivided interest in a fractional piece of land deeded by Joseph F. Roy to Celia F. and Fannie A. D. Cogswell, now Celia F. Cushenbury and F. A. D. Mathews, it being a part of the S. W. $\frac{1}{2}$ of the S. W. of Sec. 5, Twp. 50, Range 29."

The certificate of acknowledgment of the female grantors to this deed is as follows:

"Being by me made acquainted with the contents of said deed, acknowledged on an examination apart from their respective husbands, and they executed and delivered the said deed freely and without compulsion of their said respective husbands."

On the offer of this instrument in evidence, defendants objected because the description was insufficient to identify Tract A, and the acknowledgment did not recite that the married women had declared they executed "freely and without compulsion or undue influence" of their husbands.

4. Oct. 29, 1857. Warranty deed, Book 27, page 46, William Cogswell and wife to F. A. D. Mathews, the granting clause being as follows:

"Bargain, sell and convey to the said F. A. D. Mathews and all her children she has now or ever may have the following described tract of land, to-wit:" (Here follows description of Tract A).

The *habendum* clause reads:

"To have and to hold the same unto the said F. A. D. Mathews and her children as aforesaid and their heirs, but it is to be distinctly understood if the said F. A. D. Mathews may hereafter conclude to sell the above described tract of land she is hereby empowered and authorized to do so by arranging it so that the proceeds of said land is to be laid out for other lands or property to

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be conveyed so as to put the right of title in the said F. A. D. Mathews and her children."

TRACT B:

5. June 1, 1868. Patent, U. S. to William Cogswell, containing 101.60 acres.

6. April, 1856. Warranty deed recorded Book Y. page 532, William Cogswell and wife to Fanny D. Mathews. The granting and *habendum* clauses are the same in this deed as in number 4 supra.

TRACT C: $4\frac{2}{3}$ acre tract described by metes and bounds (approximately 15 poles E. and W. by 42 poles N. and S.) in and out of the N. E. corner of New Madrid Claim Survey at N. W. corner of Tract B.

7, 8 and 9 are transfers which bring the title down to Jonathan Colcord.

10. Aug. 9, 1850. Warranty deed, Book P, page 477. Jonathan Colcord and wife to F. A. D. Cogswell and Celia F. Cuisenbery, daughters of Wm. Cogswell.

11. June 1856. Deed Book Y, page 528, Celia F. Cushenbury and husband, Daniel, conveying undivided interest of grantor in Tract C to Fanny A. D. Mathews. (The granting and *habendum* clauses are the same as in number 4.)

12. July 14, 1866. Mortgage with power of sale, Book 46, page 497, filed September 16, 1866, Fanny A. D. Mathews and her husband to Joseph Kinney, conveying among others, Tracts A, B and C. This mortgage recites that it is given to secure a note for \$7280, due at twelve months, with the usual power of sale.

13. May 15, 1871. Mortgagee's deed, Book 89, page 41, Joseph Kinney, mortgagee, to Joseph Beejer Kinney. This forecloses number 12.

14. Suit was brought by the State ex rel. Daniel Murphy, Collector, against Joseph B. Kinney, James P. Mathews and Fanny A. D. Mathews, his wife, Porter H. Mathews, Andrew R. Mathews and Mary Eliza Mathews, a minor, to the March term, 1880, of the circuit court, to enforce the State's lien for taxes on Tracts A

and B for the years 1869 to 1878 inclusive. The return recites personal service on the defendants except Joseph B. Kinney, who filed answer. Guardian *ad litem* was appointed for the minor defendant and such guardian filed answer.

On March 27, 1880, judgment was rendered as prayed, adjudging the amount of taxes, interest and fees on Tract A at \$111.96, and on Tract B at \$373.42, total \$485.38.

Special execution was issued on this judgment, September 4, 1880, and the sheriff sold all of Tract A for \$410 and eight acres off the west side of Tract B for \$480, to Matilda Kinney, out of which the sheriff paid the judgment and costs, and had remaining \$245.68.

Thereupon the defendant J. B. Kinney filed his motion setting up that he was the absolute owner of the lands sold and was entitled, as against the other defendant's to this surplus of sale proceeds, \$245.68. Notice of this motion was given to Porter H. Mathews by posting in the clerk's office, and the motion was sustained by the court on September 29, 1881, Sheriff's deed, dated October 25, 1880, recorded in Book 120, page 448.

15. Oct. 4, 1880. Warranty deed, Book 111, page 537, by James P. Mathews, Fannie A. D. Mathews and Andrew R. Mathews to Mary E. Mathews, conveying Tract A, 30.93 acres; also Tract B, therein recited as 90 acres.

16. Dec. 14, 1882. Warranty deed, Book 130, page 143, consideration \$3000, from J. B. Kinney, J. Kinney and Matilda Kinney, his wife, to Mary E. O'Donnell, conveying Tracts A, B and C, containing a recital as follows:

"Should at any time the title be imperfect, and the above Kinneys unable to make it perfect, then said Kinneys agree to refund all money paid in original purchase, upon condition that Mary E. O'Donnell deed the

said property back to them, and also give the 'said Kinney's possession of the land.'"

17. Aug. 12, 1885. Warranty deed from Joseph B. Kinney and Alice P. Kinney, his wife, to Mary E. O'Donnell, Book 141, page 94, consideration \$5 cash, conveying Tracts A and B. (This deed evidently was made to release dower of Joseph B. Kinney's wife, Alice P.).

18. Sept. 13, 1882. Mortgage deed of trust, Mary E. O'Donnell to Joseph B. Kinney, trustee, to secure note of \$3000 due eight years after date, bearing eight per cent interest, to Joseph Kinney, mortgaging Tract B, recited to contain 80 acres.

19. April 25, 1892. Warranty deed, recorded, Book 186, page 367, Mary E. DeGarmo, formerly Mary E. O'Donnell, and husband Frank DeGarmo, to Michael H. O'Donnell, Daniel C. O'Donnell, Richard M. O'Donnell and Mounnie D. O'Donnell, consideration \$6000, conveying Tracts A and B, subject to deed of trust from Mary E. O'Donnell to Joseph B. Kinney, which the second parties assume and agree to pay.

20. April 30, 1900. Warranty deed, Book 226, page 254, M. D. O'Donnell to Richard M. and Michael H. O'Donnell, conveying Tracts A and B and other lands.

21. Jan. 7, 1915. Warranty deed, Book 334, page 231, Daniel C. O'Donnell to Richard M. and Michael H. O'Donnell, conveying Tracts A, B and C.

J. B. Kinney, witness for plaintiff, by deposition testified on direct examination as follows:

My full name is Joseph Beeler Kinney; father's name, Joseph Kinney; mother's name, Matilda Kinney; witness born July 25, 1846; married in 1882; business, steamboating; father's and mother's home, which he called his home, was in Old Franklin, Howard County, Missouri; his mother died in 1896, his father two or three years previously. That he bought the land in question in this case at foreclosure sale under mortgage in which his father was mortgagee; could not remember when; did not remember what he paid; that he "left" Mathews stay on the place; he promised to keep up the

place; he found that Mathews was tearing down the brick storehouse and selling the brick off the place; that witness then dispossessed him and put someone else on the place; that he then sold the land to Mary O'Donnell whom he put in possession; could not remember what she paid for it; that he bought the place for himself to save the debt due his father, as he recollected it, and wanted to keep the land in the family; when he sold it to Miss O'Donnell she gave back a mortgage to secure a note payable to his father; asked how it came he "left" this property sell for taxes, he answered that there was a large amount of taxes on it and that he let it go to make the title better; that Judge Gates was instructed by him to buy it in at the sheriff's sale; supposes he paid the money, don't remember now; his mother was not present; that Mr. Mathews's lawyer also bid at the sale; that the land was bid up to nine hundred some odd dollars, and the sheriff afterwards sent him a check for the surplus; did not remember whether it was bid in in his name; that only 47 acres of the land was sold for taxes; that Miss O'Donnell was very intimate with his family and it was through them that the sale was made to her; witness did not remember ever talking to her about the title; he remembered making the deed and selling it to her; supposed his father and mother joined him in the deed; did not remember making the deed in which his wife, Alice P., joined; that the \$3000 note Miss O'Donnell made payable to his father was paid a long time ago; witness did not know what became of it; thought the administrator of his mother's estate was the last one that had it; did not know why the clause in the recorded deed to Miss O'Donnell was put in, concerning refunding the purchase price.

Mary DeGarmo, witness for plaintiff, by deposition, testified: That her maiden name was Mary E. O'Donnell, sister of Daniel, Richard, Mounnie and Michael O'Donnell; she was born November 3, 1861; knew Joseph Kinney, his wife Matilda, and son J. B. Kinney and his wife; she first met them at a farm near Franklin, Howard Coun-

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ty, Missouri, where she and her parents lived and were neighbors with the Kinneys; was then about 18 years old; asked if she knew how the Kinneys came to own the property in question, answered, "I do," but that she did not like to go into details; that Captain Kinney loaned money to Mr. and Mrs. Mathews on the farm at Cogswell's Landing, Jackson County, the old home name of the farm; that the Mathews did not pay back the money; they lost their home in St. Louis where they were living; Kinney moved them back on one of his boats to the place at Cogswell's Landing; Kinney let them have money to start again on the farm; Captain Kinney had a deed of trust given by the Mathews for a part of the money he had loaned; witness had had all these papers, but had turned them over at the time she sold the place, and thought the amount of the mortgage was about \$7000; finally after the Mathews stated their inability, Captain Kinney brought a suit the nature of which she could not state; asked if it was to foreclose the mortgage, she replied that she did not know what it was called in law; Kinney's attorneys were Wallace & Gates of Independence; thought they tried the case at Lexington or Independence; she thought it was a suit that went to the Supreme Court; that when Captain Kinney loaned the money to Mathews she was teaching school as principal of the New Franklin Public Schools in Howard County; that a suit was brought for delinquent taxes; she thought it hung on for a couple of years; that Mr. Wallace told her about it in after years; the Kinneys handed her all the data relating to the matters she was testifying about and she went over it; that Captain Kinney was out some \$14,000 or \$15,000, including attorneys' fees and expenses; that in addition to teaching school she was giving private educational services to the members of Captain Kinney's family and became "sort of a clerical member" of the family; they brought out their various papers and various holdings at different times and she went over them, and in that way she became acquainted

with the story of the Mathews property, which was quite a heavy burden to Captain Kinney; that he finally sold it or gave it to Joe Kinney, his eldest son, who bought it at the mortgage sale; she did not know at the time of the property being sold for taxes; did not know that Joe Kinney had bought it in at the mortgage sale; thought his father had given it to him; that she bought the place from Captain and Mrs. Kinney not really knowing that Joe had an interest in it; later found out that he did have an interest in it; her attention being called to the fact that Joe Kinney joined in the deed with his father and mother, witness replied that such circumstances needed an explanation; that the first deed the Kinneys made was torn up; that when she came to look over the papers after she had bought the property from the Kinneys, she heard that Joe Kinney had an interest in the property; that she gave the Kinneys \$3000 and services rendered by her to them; that she went up on Captain Kinney's boat to Cogswell's Landing to see the "wonderful place I had bought;" she found Mr. Mathews and his wife and Miss Jennie living on it; had long hours of conversation with them and found them cultured and intelligent people; during her visit Mr. Mathews said his wife had been willed the place by her father, definitely stating that Mrs. Mathews could sell the place and buy a home for herself and children but that she could never mortgage it; she took the next boat to Booneville to see Captain Kinney; had not yet put her deed on record; by the time she had so returned Captain Kinney and Mrs. Kinney had discovered that their son Joe Kinney had a title not covering every acre as witness understood, but that it was necessary for her to have a new deed from the son and wife, Alice Polk Kinney; that she consulted Pennington, a lawyer at Booneville, on both these propositions and got an opinion from him addressed to Captain and Mrs. Kinney stating that the deed she had could be used, but that in order to satisfy her he recommended that they have Joe Kinney and wife sign the deed

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and insert the clause about repaying the money if the title should prove impaired; that after several months this deed was signed and filed at Independence, witness taking it there with Captain Kinney; that in the meantime, Mathews, after her visit and talk with them, turned the farm over to a man named Isaiah Johnson; at any rate, he was there and Mathews and his family moved onto another farm; that it was on account of these claims made by Mathews after she bought the place by the first deed that she had this clause about returning the money put in the second deed; that she thought it was the year after buying the land that she put her father and mother in possession; that her family remained and her father and mother died on the place; that two of her brothers were still on this farm; that she did not discuss the title with Captain Kinney fully until after she bought the property, which later discussion was the cause of the lawyer Pennington inserting the clause about the return of the money in the second deed; that at the time of the first deed from the Kinneys she gave the mortgage to secure the note to Captain Kinney, dated September 13, 1882; that she paid part of that note and her family paid the rest after she sold the place to them; that she did not think, and if she did, she had completely forgotten, that she ever discussed the title with her people when she sold them the land; "I may have done it, you will have to ask them;" that while she was negotiating for the purchase of the land she was doing some clerical work for Kinney and saw various things and papers and became familiar with the details before the transaction was closed; did not remember whether she saw the tax deed or not; did not pay much attention to it because she had the warranty deed; that she never had the title examined by an attorney before she bought it, and that was all she knew about that; she thought Captain Kinney told her about a suit he had in court to get the property, but that it was after her talk with Mr. Mathews in which he, Mathews, expressed the question as to the title;

when asked if that was brought out before the deed was finally made, answered, "Possibly before it was filed. It may not be, however. The deed will show that;" that she had been teaching probably two years before she bought this place; she never talked to Joe Kinney (the son) about it, had barely met him; that he had brought his wife home on one occasion and stayed three days; he lived down south and was a captain on a steamboat.

Porter Mathews, plaintiff, testified that he was the son of James P. Mathews and Fannie A. D. Mathews; that his father died November 28, 1898, his mother, August 22, 1915, and that he was the only surviving child; that none of the other children ever married and none of them left any descendants; that he was born in 1851 and left the farm in 1871; that he moved to California in 1883 and had lived there ever since; that immediately before that he was in Denver, Colorado, living there about a year and a half, and prior to that in Leadville about two years; that he had not lived in Missouri since 1878; in that year was at the old home place for a year; testified as to the buildings on the land in question; that the farm was under fence and some cross fenced; witness did not know about some of the property being sold for taxes at the time it was sold, but afterwards knew it was sold; on his asking what time it was sold and being told that it was some time in the year 1880, answered that he was in Colorado; that when witness was on the place in 1878, about fifty acres of the land was in timber; that when last on the place, about three months before the trial, he thought only about eight or ten acres was in timber; and the other had been removed; that all of the place except the seven or eight acres in timber was in cultivation when he was last on the place, and in 1878 it was all in cultivation except the fifty acres then in timber.

Joe Cogswell testified that the land in question seemed to be pretty good level land lying along the river; thought it not subject to overflow except at very high waters; used mostly for grain lands; that he had

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been farming in that part of the county for about twenty years; supposed the money rental value to be about \$8 an acre; estimated the amount of the farm in cultivation as eighty or ninety acres.

Isaiah H. Johnson testified that he moved onto the land in question to occupy it in the latter part of August, 1881; that while living there he met Miss Mary O'Donnell in the summer of 1882; don't remember having any conversation with her relative to the title; did have some talk with members of the O'Donnell family about 1882, probably a year after; this talk was with the O'Donnell father in the presence of the boys, Dan, Michael, Richard and Monty; thought they were all grown then except Monty, who was probably fifteen years old; this talk was after 1882 and was concerning that Mr. Mathews was claiming the place; that it was a common thing to hear that talked about in the neighborhood; that the litigation over the title was talked about in the neighborhood; J. B. Kinney told him in the spring of '82 that he had lawed Mr. Mathews for fourteen years; this conversation was while witness was occupying this place; the O'Donnells moved on the adjoining place in the spring of '82, and on this land in question in the latter part of '82, by arrangement with the witness; described the buildings then on the place as a dwelling house, a store house and some old tumbledown other buildings; the farm was fenced; that the adjoining land rents for \$10 an acre.

The testimony of B. F. Johnson was substantially the same.

For the defendants, M. D. O'Donnell testified that he is one of the grantees of the deed to the land in question, from his sister; that he was ten years old in 1882 and his brother Richard was twelve years old; that all of the boys were minors with about two years difference between their ages; that he recollected going on

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the farm with his father and mother; his sister was then living in Booneville; she never lived on this farm; she visited the home during her vacations; the land was conveyed to the witness and his brothers by their sister Mary in 1892; that the witness did not then have any knowledge of any defect in her title, "we thought our title was all right;" that he had heard, after he and his brothers bought the place, a general gossip that the Mathews were questioning the title; that the postman at Levasy told him that some lawyer from Independence had spoken to him about it; witness thought it was from two to five years after they bought the place that he first heard this.

Defendants introduced in evidence an agreement between the parties as to the children of Fannie A. D. Mathews and the dates of their births and deaths, as follows;

	Born	Died
Porter H. Mathews (plaintiff).....	April, 1851
Andrew R. Mathews	May 19, 1853.....	1908
Fannie J. Mathews	Sept. 19, 1855.....	April, 1873
Ellen Mathews	Jan. 3, 1859	Mar. 14, 1859
Mary E. Mathews	April 25, 1862.....	1906
Cecil C. Mathews	Aug. 8, 1865	Sept. 5, 1865
Sarah A. Mathews	Aug. 30, 1867	April 27, 1870

(None of the children left descendants.)

The husband of Mrs. Mathews, father of the children, died November 24, 1898.

Mrs. Mathews died August 22, 1915.

This is all the evidence. The defendants did not testify.

I. The appellants' brief does not contain a statement of the facts in this case, as required by Rule 15.

Brief. We might dismiss the appeal for failure to comply with the rule, but prefer to dispose of the case on its merits.

II. The deed from Fanny A. D. Mathews and Celia F. Cushenbury and their husbands to their father, William Cogswell, conveying Tract A, 38.93 acres, was executed in June, 1856.

Appellants' objection to this deed is that the certificate of acknowledgment omits the words "or undue influence." Revised Statutes 1855, chapter 32, section 39, page 363, requires the certificate of acknowledgment of a married woman shall set forth "that she executed the same freely and without compulsion or undue influence of her husband." The certificate recites that "they executed and delivered the said deed freely and without compulsion of their said respective husbands." The law touching acknowledgments requires no more than a substantial compliance with its terms. [Chauvin v. Wagner, 18 Mo. 531; Hughes v. Morris, 110 Mo. 306; Alexander v. Merry, 9 Mo. 514.]

In Gross v. Watts, 206 Mo. 373, l. c. 393, it was held (syl. 4): "A certificate of acknowledgment is not defective because it does not recite that the deed was executed as the grantor's 'free act and deed.' The statute requires it to state the 'act of acknowledgment' and where the certificate recites that the grantor 'duly acknowledged the execution of the same,' it substantially complies with the statute."

See also Ray v. Crouch, 10 Mo. App. 324; Hughes v. McDivitt, 102 Mo. 77; Huse v. Ames, 104 Mo. 91.

The identical question was ruled adversely to appellants' contention in Bohan v. Casey, 5 Mo. App. 101, l. c. 110, where the court said: "It is complained that the notary did not ask the wife as to 'undue influence' and to have asked her as to 'compulsion' is not enough. But the notary asked her whether she executed the deed of her own free will or whether her husband compelled her to do it. To the former question she re-

plied: Yes; and to the latter: No. The words 'undue influence' do not appear to have been used, but it was not necessary to use the very words."

The object of the law, as Scott, J., said in substance, is to obtain the free and unconstrained consent of the wife to the deed alienating her rights. If this is done, the law is satisfied. The law has entrusted the writing of deeds and the taking and certification of acknowledgments to officials unskilled in the drafting of forms. It is a task beyond their powers from the want of skill. Under such circumstances it would be hard in courts to exact a rigorous compliance with forms. Such a course would disturb a great many titles, and that, too, in cases where no wrong has been done and where there had been entire acquiescence in the acts, conscious of their propriety, until the information of the technicality is found out by some prowling assignee, or some child who may make the mother who bore him sin in her grave. [Dissenting opinion in Chauvin v. Wagner, 18 Mo. l. c. 556.] It is the policy of the law to construe them (certificates of acknowledgment of married women) liberally, and where a substantial compliance appears clearly and affirmatively, the certificate will be held sufficient, no matter what the language employed. [1 C. J. 858, sec. 209.]

In the instant case, Mrs. Mathews and her sister, owning the tract in common, conveyed it to their father who reconveyed the whole of it to Mrs. Mathews and her children as a settlement. She accepted and retained possession, claiming title under this deed, and was satisfied.

III. It is also urged that the description in the deed, at number 3 of the abstract, is insufficient to identify Tract A, and that it is also bad "because it says our undivided interest" and did not undertake to convey the land itself, and the words

Description.

"our undivided interest" describe nothing. If the deed did not refer to the Joseph Roy deed, the description would be indefinite, but it reads; "our undivided interest in a fractional piece of land deeded by Joseph F. Roy to Celia F. and Fanny A. D. Cogswell," etc. The reference to the Roy deed, where the tract is described, identifies the tract conveyed.

"The office of a description is not to identify the land but to afford the means of identification, and when this is done it is sufficient. Generally, therefore, any description is sufficient by which the identity of the premises can be established, or which furnishes the means of identification. A conveyance is also good, if the description can be made certain within the terms of the instrument, for the maxim, *Id certum est quod certum reddi potest*, applies. So a description from which a surveyor can locate the land is good. A deed will not be held void for uncertainty of description if by any reasonable construction it can be made available. Extrinsic facts pointed out in the description may be resorted to to ascertain the land conveyed, and the property may be identified by extrinsic evidence, as in the case of records of the county where the land is situate." [18 C. J. 180.]

"The property intended to be conveyed may be designated by the descriptive name of the tract by which it is generally known, or well known, or can be identified, or where there is no other tract of the same name in that locality, even though there are defects in other parts of the description." [18 C. J. 181. See also *Bollinger County v. McDowell*, 99 Mo. 632; *Whitwell v. Spiker*, 238 Mo. 629.]

The deed conveys "all our undivided interest," meaning the undivided interest of each grantor. Evidently the deed was written by an unskilled hand, yet the meaning is plain. The grantee took and retained

exclusive possession of the tract conveyed. This of itself would cure the defective description. The defendants derive title through the conveyance. It passed the interests of the grantors. [18 C. J. 292, sec. 268.]

IV. Did the several deeds conveying the three tracts "to Fannie A. D. Mathews and all her children she has now or ever may have" vest in Fanny a life estate with remainder in fee to her children?

Fee or
Remainder.

In considering this question we should not overlook the *habendum* clause which is the same in each deed. If the parties understood that Mrs. Mathews took a fee simple estate, why did they give her the power to sell on condition that the proceeds should be invested in other lands to be conveyed so as to put the title in her and her children?

Appellants are somewhat at sea. They contend that the deeds should be construed as either vesting a fee in Mrs. Mathews, or an estate in common in her and her children, "the estate opening to let in each unborn child." In *Hamilton v. Pitcher*, 53 Mo. 334, the deed was to M. W. Pitcher and her children. It was held that she and her children *in esse* took as tenants in common. The same ruling was made in the case of a devise in *Allen v. Claybrook*, 58 Mo. 124. [See, also, *Hall v. Stephens*, 65 Mo. 670.]

It is obvious that neither of these cases lends support to either of appellants' contradictory constructions of the deeds in question. Here the grant is to Mrs. Mathews "and all her children she has now or ever may have." If the grantor intended the children to take a present interest he doubtless would have expressed that purpose by naming them as grantees. The grant, however, has the *indicia* of a settlement. The *habendum* empowers her to sell the land, but expressly provides that in case of a sale "the proceeds shall be laid out for other lands or property to be conveyed so

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as to put the right of title in the said F. A. D. Mathews and her children," that is, those born and unborn.

In the annotations to *Rice v. Klette*, 149 Ky. 787, 149 S. W. 1019, L. R. A. 1917B, 45, where the cases are collated, the learned editor at page 65, says: "It has been held that if, in addition to the bequest, there are any superadded words which import a desire that the property shall be settled, the court will lay hold of the words and infer a gift to the parent for life, with remainder to the children." Citing *Holt v. Bowman*, 33 Ga. Supp. 129, where a devise to a woman and her children was held to give the mother a life estate and the children a remainder in fee; and *Re Bellasis*, L. R. 12 Eq. (Eng.) 24 L. T. (N. S.) 466, 19 Week. Rep. 699, in which "an informal instrument creating a trust 'for my niece Mrs. Chas. Milford and her children' was held to create a trust for Mrs. Milford for life, with remainder to her children as joint tenants."

On this question our court has spoken in no uncertain terms. In *Garrett v. Wiltse*, 252 Mo. 699, LAMM, J., conclusively answered the contention that the mother and children take as tenants in common under these deeds, and gives the sanction of his approval to the same ruling by VALLIANT, J. At the foot of page 710, the learned jurist said: "Look at it from another viewpoint. As said, there were three children in being, born of Laura Alice by Richard, her husband, at the time of the Whitson deed. Now, in construing a deed it is sometimes worth while to take into account what the grantor would say but does *not* say as well as what he does say in getting at his intent. This grantor in making a conveyance on which, when spread of record, the world might act, named none of those children. If he desired them to take a present interest as tenants in common with their mother why did he not say so and name them? Is that not the usual way? Why.

in dealing with grandchildren, did he ambush and screen his intent by use of a term importing to the contrary? In speaking to that phase of the matter the words of VALLIANT, J., in Tygard v. Hartwell, 204 Mo. l. c. 206, are apposite thus: 'It would be a very strained construction to say that it was the intention of the parties to this deed to convey the land to James F. White and his children as tenants in common. If such had been the intention the natural course would have been to have inserted the names of the two children then living in the granting clause of the deed as grantees. If it was the intention to include not only those then in being but those thereafter to be born, then the idea of a tenancy in common must be excluded because the unborn children could not be made tenants in common in an estate presently created. [Kinney v. Mathews, 69 Mo. 520; Rines v. Mansfield, 96 Mo. 394.]''

It will be noticed that these rulings are based on Kinney v. Mathews, 69 Mo. 520. By referring to the opinion in that case, l. c. 524, it will also be seen that VALLIANT and LAMM, JJ., adopted the argument of NAPTON, J.

After Kinney, on May 15, 1871, had purchased the three tracts of land involved in this action at the foreclosure of the mortgage given by Mrs. Mathews and her husband to Joseph Kinney, he brought an action of ejectment, in July, 1876, against James P. Mathews. He did not claim that Mrs. Mathews owned the fee, but contended that the giving of the mortgage was a valid execution of the power of sale given her by the deed from her father. The venue was changed to Livingston County. In the circuit court it was held that the power was special and limited, and did not empower her to execute the mortgage. On appeal this court considered the terms of the grant and the power to sell contained in these very deeds. Concerning the pow-

er of sale, NAPTON, J., in an opinion handed down June 13, 1879, with the concurrence of all the judges, at page 522, said: "The power to sell was not a general one, but was restricted to a sale in which the proceeds should be invested in other lands or property to be settled for the uses specified in the original conveyance. The lands could only be sold or exchanged for lands previously settled or secured to the wife and children. . . . The grantor, however, had an interest which she could convey. . . . This renders it necessary to determine what interest Mrs. Mathews had, and upon this point it must be conceded that there is room for doubt. . . . A tenancy in common could certainly not be claimed, except we reject the clause in the deeds which expressly includes future-born children."

After reviewing and distinguishing other cases, it was the judgment of the court that Mrs. Mathews had a life estate in the lands, which was vendible, with remainder in fee in her children; HENRY, J., dissenting; SHERWOOD, J., expressing no opinion.

In the light of the foregoing authorities, we think it clear that the grants contained in the deeds in question manifest an intention to make a settlement and that Mrs. Mathews took a life estate only in the lands with a remainder in fee in her children.

V. Appellants complain that the court erred in setting aside the sheriff's deed, pursuant to the judgment for taxes. This sale includes Tract A and eight acres off of the west side of Tract B. The testimony shows very clearly that Mrs. Mathews and Kinney, the life tenants, allowed the taxes to go delinquent for the years 1869 to 1878. As we have seen, Joseph Kinney acquired the life estate of Mrs. Mathews at a foreclosure sale, May 15, 1871, and arranged for Mathews to remain on the land as his tenant. After the

**Sale for
Taxes.**

opinion in *Kinney v. Mathews* was handed down, Kinney determined to let the land go to sale for delinquent taxes in order to acquire the title of the remaindermen. Suit was brought to the March term, 1880, and judgment rendered at that term, under which the land was advertised for sale, and on October 2, 1880, forty-seven acres were sold. Kinney employed Judge Gates to bid in the land at the sale. His mother, who lived in Howard County, was not present at the sale. He did not remember whether the deed was made to his father or to his mother, but supposed he paid the money.

The payment of the taxes was a charge upon the life estate. It was the duty of the life tenant to pay the taxes and protect the interests of the remaindermen. [*Fountain v. Starbuck*, 209 S. W. 900; *Bone v. Tyrrell*, 113 Mo. 175, 188, 20 S. W. 796.] The purchase of the land at the tax sale inured to the benefit of the remaindermen. [*Peterson v. Larson*, 225 S. W. 704.] It operated as a mere payment of the taxes. [*First Congregational Church v. Terry*, 130 Iowa, 513, 515; *Blair v. Johnson*, 215 Ill. 552, 557.] Kinney occupied a fiduciary relation to the remaindermen and was bound to exercise every reasonable precaution to preserve the property intact for transmission at the termination of the life estate. [*Gibson v. Brown*, 62 Ind. App. 460.] Not only Kenney, but all who took title from him with notice of the violation of the trust, were trustees *ex maleficio*. [*Case v. Goodman*, 250 Mo. 112.] Mary O'Donnell and her brothers had constructive notice from the deed records that J. B. Kinney had only the life estate of Mrs. Mathews. The tax deed informed them that the life tenants had suffered the land to go to sale for delinquent taxes which the law required them to pay. [*Loring v. Groomer*, 110 Mo. 632, l. c. 641.] But it further appears from the evidence that Mary O'Donnell was an intimate member of Kinney's family, a clerical member; that she knew of the case in the Supreme Court, then of the

Mathews v. O'Donnell.

suit for delinquent taxes and of Kinney's purpose in letting the land go to sale, and that he was the real purchaser. She dealt with him, not with his mother. She testified she had gone over the papers and was familiar with the details before closing the deal. She contracted for the purchase of the land without having seen it, giving her note for \$3000 at eight years. After this, Captain Kinney took her to see the "wonderful place I had bought." She learned from Mr. Mathews that Mrs. Mathews could sell the place and buy a home for herself and children, but could not mortgage it, the very conclusion reached in *Kinney v. Mathews*. She tore up the deed Kinney had given her and, on the advice of an attorney at Booneville, had another deed executed protecting her against failure of the title. It does not appear when or how much, if anything, she ever paid on her note, but in 1892 she sold the farm to her brothers who assumed the payment of the note. Her father, mother and brothers had lived on the farm for ten years.

The condition of the title had been the subject of general neighborhood talk for many years. It could not well have been otherwise, in view of the decision of this court in *Kinney v. Mathews*. Mathews, as we have seen, told Miss O'Donnell how the title stood. It was generally known that the children of Mrs. Mathews would be entitled to the land when their mother died. The testimony of the Johnsons is that this was discussed in the O'Donnell family when the defendants were present in the winter of 1882. They heard this testimony and did not take the witness stand.

"Courts of equity, since their earliest foundation, have always recognized that the still, small voice of suggestion, emanating as it will, from contiguous facts and surrounding circumstances, pregnant with inference and provocative of inquiry, is as potent to impart notice as a presidential proclamation or an army with banners." [*Conn. Mutual Life Ins. Co. v. Smith*, 117 Mo. 261, l. c. 292.]

It was held also in the case last cited, and indeed it is an elementary proposition, that the burden of proving a bona-fide purchase from a fraudulent grantor rests on the defendant pleading it. [20 Cyc. 763.] To support the plea that defendants were innocent purchasers, they must prove they bought without notice, and paid the purchase money also without notice. [Halsa v. Halsa, 8 Mo. 303; Young v. Schofield, 132 Mo. 650, 660; Lincoln v. Thompson, 75 Mo. 613, 638.] The failure of the defendants to testify creates an inference that they refrained because the truth would not aid their contention and affords strong evidence of the fraud charged. [20 Cyc. 763; Stephenson v. Kilpatrick, 166 Mo. 262, l. c. 269. See also Eck v. Hatcher, 58 Mo. 235; Burger v. Boardman, 254 Mo. 238, l. c. 256.] The learned court did not err in canceling the deed.

VI. It is insisted by appellants that the interests which Mrs. Mathews inherited from her deceased children subsequent to the execution of the mortgage,

After-Acquired
Interest.

July 14, 1866, to Joseph Kinney, passed by virtue of Section 36, Chap. 32, p. 363, Revised Statutes 1855, now Section 2266.

Revised Statutes 1919.

In Hendricks v. Musgrove, 183 Mo. 300, l. c. 309, it was said: "In addition to this the rule in this State is that the doctrine of after-acquired property does not apply to a married woman's deed (at any rate if it was made prior to 1889 when the Married Woman's Act was passed), but that without regard to the form of the deed only whatever interest she had at the date of the deed passes. [Brawford v. Wolfe, 103 Mo. l. c. 397; Ford v. Unity Church Society, 120 Mo. l. c. 509.]"

This ruling was affirmed in Conrey v. Pratt, 248 Mo. 576, l. c. 583.

VII. The Statute of Limitations did not begin to run against the plaintiff until the death of his mother

on August 22, 1915. The remainderman cannot come into court to recover possession of the land before the life estate has terminated, and consequently **Limitations.** neither the thirty-year statute, nor any other statute, begins to run against him until the life estate is lifted. [Hall v. French, 165 Mo. 430; Bradley v. Goff, 243 Mo. 95, l. c. 102; Danciger v. Stone, 278 Mo. 19, 27.] Kinney and his grantees with notice, being trustees *ex maleficio*, the statute would not run in their favor. [Case v. Goodman, 250 Mo. 112, l. c. 115.]

VIII. The claim that the order of the court sustaining Kinney's motion directing the sheriff to pay over the surplus money in his hands arising from the sale stops plaintiff to claim title to the land, is without any merit. It has been seen that Kinney occupied a fiduciary relation and was under obligation **Tax Sale:** to pay the taxes and protect the estate of the **Surplus** **Money.** , remainderman against the very proceeding he either instituted or allowed to be instituted for the avowed purpose of covinously defeating plaintiff's title. He will not be permitted to profit by his own wrong. The law regards that proceeding simply as a payment of the taxes by the tenant whose life estate was bound for their payment. In that view, the court rightly ordered the surplus money paid over to him. Moreover, the order was made on a motion respecting a collateral question arising after judgment. It is a bar to a renewal of any claim to the surplus fund. It is not *res adjudicata* as to plaintiff's claim of title to the land. [23 Cyc. 1224.]

The judgment is affirmed. All concur.

ON MOTION FOR REHEARING.

In the motion for rehearing it is claimed that the court is in error in several important phases of the case.

I. It is said that Joseph B. Kinney acquired title May 15, 1871, at the foreclosure of the mortgage given by Fannie A. D. Mathews and her husband to Joseph

Grantee
of Life
Tenant.

Kinney, July 14, 1866, and that he did not get possession of the land until after the decision in the case of Kinney v. Mathews at the April term, 1879.

Kinney testified: "I left Mathews stay there and kept telling him I did not want him to move off this place if he would only keep up the property, and he promised this and he promised that, and finally someone wrote me that he was tearing down a brick storehouse and selling the brick off the place, and I went down to look at it, and saw that he was just letting the property go down and was selling the brick from the storehouse.

. . . I left him there for I don't know how long, but he seemed to be angry, mean and mad, and I sent a man down there and told him to get right off the place and if he didn't get off to throw him off, and I put it in charge of some of the neighbors there.

"Q. Did you ever rent the place to anybody? A. I don't recall it now. I remember I told these people to go on there and take care of the place and they could have all they made off of it; but if I leased it I cannot remember."

The purport of this testimony is that Mathews became Kinney's tenant in the year 1871.

Mrs. Mathews, the life tenant, allowed the taxes to go delinquent for the years 1869 to 1879. The motion states that Mrs. Mathews was in possession of the land until Kinney got possession. It was improved, productive, farming land. When Kinney acquired his title and possession he stepped into her shoes and into the fiduciary relation she sustained to the remaindermen. It was the duty of the life tenant to pay the taxes. The payment of the taxes was a charge upon the life estate, no matter who owned it. The fact that the taxes were delinquent when Kinney acquired possession is immaterial, whether it was at the time of the foreclosure in May, 1871, or at the end of the litigation in 1879.

Counsel cite authorities holding that it is not the duty of the life tenant of unimproved, unproductive land to pay the taxes. That rule has no application here, as all the evidence shows this was productive farming land.

II. We have again gone over the case of *Barkhoefer v. Barkhoefer*, 204 S. W. 906. In that case the testator devised to the children of his son, Henry W. Barkhoefer, a tract of land, provided that the testator's son, Henry W., have the use of the land during his life on certain named conditions. At the time the will was made, Henry had two children; a third was born after the death of the testator. It was held that the children *in esse* at the death of the testator took a vested interest as tenants in common, subject to their father's life estate; "subject to open and let in after born children who came into being during the existence of the prior life estate." The ruling is not in conflict with *Kinney v. Mathews* where the deeds in question were judicially construed, nor with the later cases cited in the opinion.

III. It is insisted that we have overlooked the real question involved in the defective acknowledgment to the deed at number 3 of the abstract, conveying the 39-acre tract, A, and have disregarded the majority opinion in *Chauvin v. Wagner*, 18 Mo. 531. The certificate recites that they (the married women) "executed and delivered the deed freely and without compulsion of their said respective husbands." The objection is that the words "or undue influence" were omitted, and exception is also taken to the quotation from the opinion of Scott, J., as not stating the law of the case.

It will be seen from the opinion of GAMBLE, J., at page 545, that the statute required the certificate to state that "the contents were made known and explained to her." The certificate recited that Mrs. Chauvin was "made acquainted with the contents of the deed." It

was held that the statement that she was made acquainted with the contents of the deed was a substantial compliance with the statute.

The certificate was further required to state that "she does not wish to retract." The court said: "She is to be examined as to whether the deed had been executed by her voluntarily, not whether she wished it to be in force as a conveyance. Still, if the acknowledgment which she is to make, is to include her present wishes in relation to the deed, it must so appear." [P. 548.]

It was held by the whole court that it would have been superfluous to "make known and explain the contents of the deed" (although the statute required it) to one already acquainted therewith, but it was also held by two of the judges that, as the law still gave Mrs. Chauvin a *locus penitentiae*, the failure to state that "she did not wish to retract" was fatal; Scott, J., dissenting.

We are asked to declare this deed, executed in the year 1856, and under which possession has ever since been held, void because of the omission of the words "or undue influence" in the certificate of acknowledgment. It is argued that there is a difference between compulsion and undue influence, and that the fact that she executed the deed freely and without compulsion is not a compliance with the law. There may be a shadowy distinction, but the law looks to the substance rather than the shadow.

The motion for rehearing is overruled. All concur.

EARNEST R. POLLARD, Appellant, v. WILLIAM N. WARD.

Division Two, July 19, 1921.

1. **DIVORCE: Estoppel by Judgment in Alienation Suit.** A Judgment for divorce, in an action brought by the wife against her husband, to which he made no defense, determines the status of the parties to it, but is not conclusive upon strangers as to the facts in said suit litigated, and does not operate as an estoppel in a suit by the husband against the seducer of the wife for criminal conversation and the alienation of her affections, even though her petition in the divorce suit alleged as one ground for divorce that her husband had charged her with adultery with the said seducer. The seducer not having been a party to the action for divorce, a judgment for the wife therein was not such an adjudication that the seducer had not committed adultery with the wife as estops the husband from maintaining an action for damages against the seducer for alienation and criminal conversation with the wife prior to the time the divorce judgment was rendered.
2. ———: ———: **Petition and Judgment as Evidence.** But the petition and judgment in the wife's suit for divorce brought against the husband, in which she alleged as a ground therefor that he had charged her with adultery with a certain man, are admissible in evidence in a subsequent action by the husband against such man for damages for alienating the affections of the wife, as admissions, even though the husband filed no answer in said suit, but they are admissible not as conclusive against him, but only as any other admissions which may go to the jury for what they are worth.
3. ———: **Estoppel by Conduct.** The husband is not estopped by his failure to file an answer in the divorce suit brought by his wife, in which she alleged as one ground for divorce that he had charged her with adultery with a certain man, from maintaining an action for damages against said man for alienation and criminal conversation committed prior to the time the suit for divorce was instituted; for, even though it be conceded that the husband's conduct in the divorce suit in defaulting and failing to meet the wife's charge is inconsistent with his claim for damages in the alienation suit, two necessary elements of estoppel *in pais* are lacking, namely, the defendant did not act upon the faith of the husband's conduct in the divorce suit, for his criminality with

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the wife occurred before that suit was brought, and, second, the defendant is not injured in any manner by the husband's failure to contradict or controvert the wife's charges in the divorce suit.

4. ———: **Estoppel by Property Settlement.** The fact that the husband in the divorce action brought by his wife paid his wife four thousand dollars as alimony and obtained from her a deed by which she conveyed to him her interest in property which he had acquired from her father, in no wise affects the defendant in the husband's suit for alienation and criminal conversation with the wife, and hence does not constitute estoppel.
5. **EVIDENCE: No Objection.** Unless objection is raised to testimony at the time the witness states it, its competency will not be ruled on appeal.

Appeal from Linn Circuit Court.—*Hon. Fred Lamb,*
Judge.

REVERSED AND REMANDED (*with directions*).

Pross T. Cross; H. J. West and Scott J. Miller, for appellant.

(1) The husband has a right and a cause of action against a defendant, who has had criminal conversation with his wife and who has debauched his wife, and this cause of action still exists notwithstanding plaintiff's wife has secured a divorce by default in a divorce suit against plaintiff. *Wales v. Minor*, 89 Ind. 118; *Wood v. Mathews*, 47 Iowa, 411; *Dickerman v. Graves*, 6 Cushing 308; *Ratcliff v. Wales*, 1 Hill, 63; *Barney v. Adriance*, 142 N. Y. Supp. 479; *Burdey v. Robinson*, 117 N. Y. Supp. 295. (2) The cause of action in the divorce suit was between plaintiff's wife and plaintiff; the cause of action for the criminal conversation is between plaintiff and defendant Ward. The debauching of plaintiff's wife in the suit for criminal conversation, while she was his wife, has no connection and is no bar to plaintiff's suit for damages against the debaucher of his wife. *Deford v. Johnson*, 251 Mo. 253; *Prettyman v. Williamson*, 39 Atl. 731. (3) A judgment for di-

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voiced, even at the husband's fault is not a bar to an action of this kind. *Michael v. Dunkle*, 84 Ind. 545. The defendant violated the right of plaintiff, he wronged the plaintiff and while the marital relations existed; then afterwards plaintiff's wife obtained a divorce from plaintiff and the question then arises to bar the plaintiff in his right of action for criminal conversation. The tort was complete before the divorce; that such an action is a tort and a personal action belongs to the injured spouse, is a settled fact and adjudicated law. *Bennett v. Bennett*, 116 N. Y. 584; *Nolen v. Pierson*, 191 Mass. 283; *Modisett v. McPike*, 74 Mo. 636; *Clow v. Chapman*, 125 Mo. 105; *Deford v. Johnson*, 251 Mo. 253.

Bailey & Hart, James L. Farris' Sons and Lavelock & Kirkpatrick for respondent.

(1) One of the alleged causes of action in the divorce suit and the only alleged cause of action in this suit, is identical in all respects, namely, the improper relations between Hope Pollard and William N. Ward; in such cases, the doctrine of estoppel applies, and respondent is permitted to avail himself of the divorce judgment, to which he was neither a party nor privy. *Hill v. Bain*, 15 R. I. 75; *Atkinson v. White*, 60 Me. 396.

(2) An election is in the nature of an estoppel, and when made to appear from a final judgment, it concludes the party against whom it is invoked. *Trimble v. Bank*, 71 Mo. App. 467, 486. (3) The doctrine of election is a branch of the law of estoppel, and when Hope Pollard sued appellant for divorce and charged in her petition that appellant had wrongfully accused her of improper relations with William N. Ward, she thereby put the appellant to an election between one of two inconsistent courses of action, namely, he must answer the divorce suit, prove the guilt of his wife, and thereby establish the right to maintain this suit, or he might refuse to answer, withhold his evidence, if

any, allow his wife to judicially establish her innocence, obtain a decree for divorce and defeat this suit by estoppel. *Fox v. Windes*, 127 Mo. 502, 511; *Plow Co. v. Wayland*, 81 Mo. App. 305. (4) Appellant received, at least, a part of the fruits of the judgment for divorce, namely, a deed from his former wife for her interest in all of his real estate, and "where a party has taken the fruits of a judicial proceeding, he should not afterwards be heard to question it." *Railroad v. Bridge Co.*, 215 Mo. 286, 298; *Hector v. Mann*, 225 Mo. 228, 248. (5) Hope Pollard charged in her petition for divorce, that appellant had wrongfully accused her of having improper relations with one Ward; if appellant had information to that effect at the date of the institution of the divorce suit, and failed to set it up by way of answer, he is now estopped from averring that his wife was guilty of criminal conversation with Ward. 2 Bishop on Marriage, Divorce & Separation, sec. 1589; *Gleason v. Knapp*, 56 Mich. 291. (6) There are "forms of estoppel in which knowledge of the facts upon the part of the person invoking the estoppel and reliance upon the facts and a change of situation based upon that reliance, is not an element." *Hector v. Mann*, 225 Mo. 228, 245. (7) "Ordinarily, judgments have been held conclusive only between parties and their privies, and only when both parties are bound, but this rule is subject to exceptions." *Portland Gold Min. Co. v. Stratton's Independence*, 158 Fed. 63; *Hill v. Bain*, 15 R. I. 75; *Atkinson v. White*, 60 Me. 396. (8) Appellant appeared, by counsel, to the divorce suit of his wife, but failed to answer the allegations of her petition; he assented, at least, to that part of the judgment settling property rights, received the benefits therefrom, and in so doing, elected to adopt the theory that his wife was innocent, and that he was guilty of the allegations contained in her petition; by this act, he estopped and precluded himself from averring to the contrary. *Stone v. Cook*, 179 Mo. 534, 542; *Ben-*

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sieck v. Cook, 110 Mo. 173, 182; Austin's Estate, 73 Mo. App. 61; Welch & Harvey v. Dameron, 47 Mo. App. 221; Boyd v. Redd, 118 N. C. 180; In Re Countryman's Estate, 151 Pa. St. 577; Bigelow on Estoppel (2 Ed.) 503. (9) To the divorce suit of the wife, appellant appeared by counsel, agreed with her as to the amount the court should adjudge to her as and for alimony, and also agreed with her that on the payment of \$4,000 she was to make him a deed for all her interest in his real estate, which agreement was to be made a part of the judgment for divorce; by these acts and agreements, appellant confessed that under the petition of his wife, she was legally entitled to a divorce; for if guilty, he, and not she, was entitled to the divorce if guilty. She was not entitled to alimony, and a deed would be useless; having deliberately adopted this course of action, he cannot now recede therefrom. Stone v. Cook, 179 Mo. 534, 542; Bensieck v. Cook, 110 Mo. 173, 182; Austin's Estate, 73 Mo. App. 61. (10) Appellant cannot have two strings to his bow; he appeared to the divorce suit of his wife, he was served with a copy of her petition and was fully informed as to each and every allegation contained therein. With this information in his possession, he enters into an agreement with her, adjusting certain property rights; this agreement, beneficial to him, is carried into and made a part of the judgment for divorce. He accepts and receipts for his benefits, and now seeks to make respondent liable for that which was decided against him in said divorce suit. The two proceedings are incompatible and appellant having made his election and received certain benefits from said election, he is bound thereby. Nanson v. Jacobs, 93 Mo. 345.

WHITE, C.—The plaintiff recovered judgment in the the Circuit Court of Linn County, Missouri. A motion for new trial filed by defendant was sustained by the trial court, and from that order the plaintiff has appealed.

The petition charges that the plaintiff has been damaged because of criminal conversation of the defendant with the plaintiff's wife, and alienation of her affections. The answer of defendant, after a general denial, pleads estoppel. It alleges that the wife of the plaintiff, Hope Pollard, on February 24, 1917, instituted a divorce proceeding in Ray County, Missouri, against the plaintiff herein; that in June 1917, a decree of divorce was granted to said Hope Pollard, the finding of the judgment being that the defendant therein, Earnest Pollard, was the guilty party, and the said Hope Pollard was the innocent party; that the alleged facts recited in plaintiff's petition, as to the unfaithful acts and conduct of Hope Pollard toward her husband, were reported to plaintiff and within his knowledge long before the 24th day of February, 1917, and by reason of plaintiff's acts and conduct his failure to answer the petition of the said Hope Pollard, and by the judgment in the divorce proceeding, plaintiff is estopped from maintaining his action herein. The suit was brought in Caldwell County; change of venue was granted to Linn County, where the trial was had, beginning on the third day of June, 1919.

At the time of the occurrences complained of the plaintiff, Pollard, thirty-eight years old, lived on his farm in Caldwell County with his wife and four children. He separated from his wife January 29, 1917. Another child was born to his wife two or three months afterward. The defendant, William Ward, then a single man, lived with his parents about a quarter of a mile from the Pollard home.

A volume of evidence was introduced by the plaintiff tending to prove improper intimacy between the plaintiff and the defendant's wife, which ran over a period of two or three years before the separation, January 29, 1917. A number of witnesses, including neighbors and others, testified that they saw the defendant visit plaintiff's home during plaintiff's absence, and apparent secret meetings between Hope Pollard and the defendant.

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Some of the witnesses swore to seeing acts of a criminal nature between them.

On January 28, 1917, plaintiff became convinced that a clandestine meeting had taken place between his wife and Ward, and procured bloodhounds which traced the tracks of someone to Ward's house. Plaintiff separated from his wife the next day. It is unnecessary to state the evidence any further than to say it is sufficiently clear and substantial to support the allegations of the petition.

The defendant denied all charges, and introduced evidence to show his good character. He introduced the pleadings and judgment in the divorce proceeding begun by Hope Pollard a short time after the separation from her husband. Other facts necessary in consideration of the points to be determined will be noted later in the opinion.

The jury in their verdict assessed the plaintiff's actual damages at five thousand dollars and his punitive damages at seven thousand dollars. The motion for new trial was sustained on the ground that the matters charged and put in issue by the petition in the divorce proceeding, "were largely if not entirely matters involved in the present trial." The trial judge clearly stated his reason for sustaining the motion, thus:

"Under these facts the court is of the opinion that having failed to deny the allegations of the said divorce petition and having made a money settlement upon the charges confessed in it, and having confessed the truth by having failed to answer, plaintiff in this case is estopped from further asserting the infidelity of said wife and ought not in good conscience be permitted to maintain this action."

The petition in the divorce proceeding alleged that the defendant in that suit, Earnest R. Pollard, had offered his wife, Hope Pollard, such indignities as to make her condition intolerable. The indignities enumerated consisted of several specifications of cruel and barbarous treatment, abuse and villification. The petition

then alleged that on the evening of January 28th, the plaintiff, Hope Pollard, left the house for a few minutes and when the defendant saw his wife coming back he charged her with meeting a man "out there," and . . . "repeatedly said and accused plaintiff of having met the son of Mr. Ward that night, . . . and plaintiff says that the defendant has repeatedly since then accused the plaintiff of improper relations with other men and has ordered her to leave him."

The judgment in the divorce proceeding recites a finding that during all the time plaintiff faithfully demeaned herself and discharged all of her duties to the defendant as his wife, "but that the defendant cursed and abused her at divers times and did such other and improper conduct towards her as his wife as to render her condition intolerable as set forth in plaintiff's petition." Alimony to the plaintiff was allowed in the sum of four thousand dollars, and she was required to execute a quit-claim deed to defendant for all the land of defendant. The acknowledgment of the receipt of such deed is recited in the decree.

I. The general rule is that a decree of divorce does not bar an action for previous alienation of affections, or criminal conversation or seduction.

Estoppel by Judgment.

[21 Cyc. 1626; DeFord v. Johnson, 251 Mo. 244, 1. c. 253 to 256, and cases there cited.]

This court in the opinion by GRAVES, J., in that case, said at page 255, speaking of cases cited:

"They declare the general doctrine that although the jury may believe that plaintiff's wife obtained a divorce from him, and that she made plaintiff's misconduct ground for obtaining said divorce, yet if the jury believe that notwithstanding such misconduct on the part of the plaintiff, his wife would not have separated or remained apart from him, or sued him for a divorce if it had not been for the acts, conduct and influence of defendant toward her; and that defendant purposely and intentionally, by such acts, conduct and influence,

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induced her to so separate or remain apart from plaintiff, or sue him for a divorce; then, the fact that plaintiff's wife obtained such a divorce on account of plaintiff's misconduct, does not, of itself, constitute any defense to this suit."

This is quoted from *Modisett v. McPike*, 74 Mo. 1. c. 646. The *DeFord* case is reported in 46 L. R. A. (N. S.) 1083, with copious notes citing numerous cases where the subject is illustrated. There is no direct allegation in the petition for divorce which puts in issue the criminal conversation of Ward with the plaintiff's wife alleged in this case, so that it could be said to have been adjudicated in that case. .

The point made by the defendant, and the point in the mind of the court in sustaining the motion for new trial, is that the plaintiff could have defeated his wife's suit for divorce by proving the facts as to her relations with the defendant; that the very issues presented for determination in this case must have been determined there, because plaintiff failed to present a defense to that divorce proceeding, which was complete if true; the judgment, therefore, is conclusive that his wife was not guilty of misconduct.

In taking that position the respondent assumes that a judgment in a divorce proceeding is different from other judgments in that it is binding upon others than parties to it. There was such a holding in the case of *Gleason v. Knapp*, 56 Mich. 291, a case followed in some jurisdictions. That case, however, has been modified and deprived of much of its force by subsequent adjudications by the Supreme Court of Michigan. [*Knickerbocker v. Worthing*, 138 Mich. 224, 1. c. 228; *Philpott, v. Kirkpatrick*, 171 Mich. 495.]

The precise point has never been determined in this State, but it was approached in the *DeFord* case, *supra*. A number of decisions in other jurisdictions take a position contrary to that assumed by the trial court. In *Luke v. Hill*, 137 Ga. 159, 38 L. R. A. (N. S.) 559-

563, it is held that a decree of divorce is a judgment *quasi in rem*. "So far as adjudication fixes the *status* of the parties the judgment concludes both parties and strangers; but, beyond the adjudication of the *status*, the decree does not conclude strangers. . . . A divorce decree will not estop a party thereto from contesting with a stranger the truth of the grounds as affecting his liability in another suit upon a cause of action arising pending the divorce suit, but before the decree."

Leading cases are cited in support of the proposition. The case of Coney v. Harney, 53 N. J. L. 53, was a suit brought by the plaintiff's wife, and it was held that a decree of divorce in favor of plaintiff's wife was not a bar to his suit for damages for criminal conversation, although he had filed in the divorce proceeding a cross-bill, afterwards dismissed, in which he charged his wife with the very criminal acts alleged as a cause of action in the suit on trial. The court said, l. c. 54-55: "An estoppel, even by the judgment of the court, must be mutual to be admissible in bar, and such a judgment will bind only those who are party or privy thereto. Here defendant was neither party nor privy. There was no mutuality, for it had been adjudicated that defendant had committed the adultery charged in the cross petition, such adjudication manifestly could not have been set up against him"—a statement of the law particularly applicable to this case.

The case of Michael v. Dunkle, 84 Ind. 544, was an action for criminal conversation brought by the husband against the seducer of his wife; the defendant set up a decree of divorce granted to her on account of her husband's cruelty. The husband knew of the criminal conduct before the divorce decree was granted. The court held that because the acts complained of occurred while she was still his wife, he had a cause of action, and then used this language at page 545: "After this discovery, it is not strange that the appellee permitted his

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wife, without resistance, to obtain a divorce; but he did not thereby waive or lose his right to redress for the injury done. It would not be in the interests of good order and the public morals to permit the seducer of the wife to set up a disagreement, or even a separation, between her and the husband, as a complete defense to an action by the latter for the wrong."

From these authorities and the others reviewed in the notes in 46 L. R. A. (N. S.) 1083 to the DeFord Case, and the Luke Case, 137 Ga. 159, *supra*, the general rule appears that a judgment of divorce is conclusive upon strangers as determining the *status* of the parties to it, but not conclusive upon strangers as to the facts litigated. The position taken in the Gleason Case cited from 56 Mich. 291, is not supported by reason nor by the weight of authority. There was no mutuality, as said in the New Jersey case, *supra*. Had the court in the divorce proceeding found the wife guilty of adultery with Ward, Ward would not be bound by it in this suit.

The pleadings and judgment in the divorce proceeding were probably admissible in evidence in this case as showing an admission on the part of the plaintiff. If Pollard, in his wife's divorce proceeding had filed a pleading which admitted any fact, or if by his silence he had failed to controvert the facts alleged there, it would be proper to show it as an admission against him. Such admission would not be conclusive against him here, but like any other admission it could go to the jury for what it was worth. [See *Sickler v. Mannix*, 68 Neb. 21, l. c. 23.] Logically it must follow that the plaintiff is not concluded by the judgment in the divorce proceeding.

II. Next, the question arises as to whether the plaintiff is estopped by his conduct. It is true that he permitted a decree of divorce to be rendered against him

upon the allegations of his wife's petition.
Estoppel
by Conduct. While that petition did not in direct terms allege that he had falsely charged her with illicit relations with Ward it may be conceded that he was

put upon his notice that such charge was intended. As said in the Indiana case cited above, after he discovered the nature of her conduct he might very well desire a divorce and make it as easy as possible for his wife to obtain one. But the proceeding lacks every element of estoppel by conduct, or estoppel *in pais*.

To constitute estoppel *in pais* three things must occur: First, an admission, statement, or act inconsistent with the claim afterwards asserted and sued on; second, action by the other party on the faith of such admission, statement or act; and, third, injury to such other party resulting from allowing the first party to contradict or repudiate such admission, statement or act. [First National Bank of Mexico v. Ragsdale, 171 Mo. l. c. 185; Wyatt, v. White, 192 Mo. App. l. c. 560; DeLashmutt v. Teetor, 261 Mo. l. c. 441; Thompson v. Lindsay, 242 Mo. l. c. 76.]

It may be conceded that in the divorce proceeding Pollard's conduct was inconsistent with the claim he puts forth here, but it cannot be said that the defendant in this case acted upon the faith of any such conduct. His criminality with the plaintiff's wife occurred before the divorce suit was brought, and before the separation. Likewise, the third requisite does not appear here. The defendant is not injured in any manner by the failure of the plaintiff to contradict or controvert the allegations of his wife's petition. If the plaintiff had asserted and maintained in the divorce proceeding the facts which he alleges in this suit, the defendant here would have been in no better position than he is. [Thompson v. Lindsay, 242 Mo. l. c. 76; DeLashmutt v. Teetor, 261 Mo. l. c. 441.] Ward did not in any manner nor to any degree rely upon anything plaintiff did in his wife's divorce suit, and is not injuriously affected in any manner by the plaintiff's position maintained here because it happens to be different from what he assumed there. The defendant is in no position to invoke the principle of estoppel *in pais*.

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III. It is further claimed by the respondent that the plaintiff herein has obtained the benefit of a transaction and seeks to repudiate it in this case in that he obtained the divorce from his wife, a deed from her, and paid her four thousand dollars alimony, and having obtained that advantage and assumed that position, he has elected so that he cannot assume a different position here. This is another way of attempting to state an estoppel. It is impossible to see how that transaction affects the defendant. The business settlement which the plaintiff made with his wife at the time of the decree consisted simply of the purchase by him of her interest in property, which he had acquired from her father. It may have been worth more than he paid her, but he is not retaining the fruits of another transaction which affects the defendant or bears any relation whatever to the issues to be determined in this case.

IV. Another ground is urged by the respondent in support of the propriety of the ruling: it is claimed that improper evidence was offered on behalf of the appellant showing the incident in relation to the blood-hounds. We cannot find that the evidence in the way it arose was incompetent, and if it was the point was not raised in time. When the plaintiff in his direct examination related the facts about calling the blood-hounds no objection was made to his evidence.

The judgment is reversed and the cause remanded with directions to the trial court to set aside the order granting a new trial, and to render judgment for the plaintiff upon the verdict as returned by the jury. And *Railey and Mozley, CC.*, concur.

PER CURIAM:—The foregoing opinion by WHITE, C., is adopted as the opinion of the court. All of the judges concur.

WILLIAM A. MONTAGUE, Appellant, v. MISSOURI
& KANSAS INTERURBAN RAILWAY COM-
PANY et al.

Division Two, July 19, 1921.

1. **PLEADING: Departure: Negligence: Cause Under Kansas Statutes.** A petition which states the ultimate fact of a cause of action for negligent personal injuries under Sections 4218 and 4219, Revised Statutes of Missouri of 1919, also states a cause of action under Sections 7323, 7324 and 11829 of the Kansas statutes; and where the petition states a cause of action under these Missouri statutes, an amended petition in which these Kansas statutes are pleaded for the purpose of showing that under them plaintiff had a right to sue, and that they create a cause of action for negligence committed in Kansas, is not a departure. The ultimate fact of negligence being alleged in both petitions, the character of proof required, the measure of damages and the judgment to be rendered upon a finding for plaintiff are the same.
2. ———: ———: **Explanatory Amendments.** A petition which states a cause of action, but states it imperfectly, may be amended so as to cure the defect. The addition by way of an amended petition of allegations which maintain, explain, fortify and strengthen the cause of action stated in the original petition, does not constitute a departure. Whether a change from law to law is a change of the cause of action depends on whether the facts essential to constitute a cause of action are the same or different in the two pleadings, rather than whether the pleader intended the one law or the other to apply. Where the original petition states the facts essential to a cause of action for damages based on unpleaded Missouri statutes, for negligent personal injuries inflicted in Kansas, an amended petition, containing the same essential allegations, to which are added others showing plaintiff's right to sue and that the same facts constitute negligence under the statutes of Kansas, which are for the first time pleaded as an amendment, is not a departure.
3. ———: ———: **Amendments Liberally Allowed.** Under the Missouri statute (Sec. 1274, R. S. 1919), amplifying and liberalizing the right to amend pleadings, and limiting the right only by the sound judicial discretion of the court applicable to the facts of each particular case, the proper rule is to allow amendments and

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the exception to refuse them, and not to refuse them unless the opposite party will be injured by the amendment; and where the amended petition does not require a different character of evidence from that necessary to support the original petition, the measure of damages and the identity of the subject-matter are the same in both, and a judgment rendered upon either will constitute a complete bar to an action on the other, the amendment should be allowed, and not held to be a departure.

4. ———: ———: **Amendment Required by Answer.** Where an amended petition is made necessary by an issue tendered in defendant's answer, filed by leave of court upon the eve of the trial, defendant is in no position to complain of an amendment which controverts or avoids the new matter set up by way of defense.

Appeal from Jackson Circuit Court.—*Hon. O. A. Lucas,*
Judge.

REVERSED AND REMANDED (*with directions*).

Kelly, Buchholz, Kimbrell & O'Donnell and Lyon
& *Lyon* for appellant.

(1) The court erred in sustaining defendant's motion to strike out for the reason that the petition, as amended by interlineation, did not operate to change the plaintiff's cause of action and did not constitute a departure. *Hanson v. Springfield Traction Co.*, 226 S. W. (Mo.) 1; *Madden v. Mo. Pac. Ry. Co.*, 192 S. W. 455; *Lee v. Mo. Pac. Ry. Co.*, 195 Mo. 400, 415; *L. & N. Railway v. Pointers*, 69 S. W. 1108; *Texas & N. O. Railway v. Gross*, 128 S. W. 1173; *Railroad v. Foster*, 78 Tenn. 351; *De Valle Da Costa v. Southern Pac. Co.*, 176 Fed. 843; *Lustig v. Railway*, 65 Hun, 547, 20 N. Y. Supp. 477; *Cunningham v. Patterson*, 89 Kan. 684; *Texas & N. O. Railroad v. Miller*, 221 U. S. 408, 417; *Neubeck v. Lynch*, 37 App. D. C. 576; *Robinson v. Railway*, 133 Pac. 537; *Shroeder v. Edwards*, 205 S. W. (Mo.) 47; *Martin v. Cotton Oil Co.*, 194 Mo. App. 106; *Breslauer v. Barwick*, 36 L. T. 52. (2) The court erred in striking out and sustaining defendant's motion

to strike out plaintiff's petition for the reason that by doing so the court has prevented any recovery by the plaintiff, for the reason that the Missouri statute (Sec. 1324, R. S. 1919) prevents the maintenance of a new action against defendants, as a new action based on the Kansas statutes is barred by the Statute of Limitations of both states. *Bowen v. Buckner*, 171 Mo. App. 384; *Lottman v. Barnett*, 62 Mo. 170; *Lilly v. Tobbein*, 103 Mo. 490; *Courtney v. Blackwell*, 150 Mo. 271.

(3) Even had there been a departure, it was a departure made necessary by the allegation of the defendant in its amended answer, and it cannot be heard to urge that an amendment to a pleading, which its act and that of the court made necessary, should be stricken out. *Lemon v. Chanslor*, 68 Mo. 340; *Oakley v. Richards*, 204 S. W. (Mo.) 505; *Sonnefeld v. Rosenthal*, 247 Mo. 238; *Frederickson v. Renard*, 247 U. S. 207; *Irwin v. Childs*, 28 Mo. 578; *Laughlin v. Leigh*, 226 Mo. 620; *Little River D. D. v. Railway*, 236 Mo. 94. (4) The court erred in assuming jurisdiction to strike out the plaintiff's petition as amended by interlineation, after said amendment had been made pursuant to leave granted by the court while the order granting the leave to amend was not revoked. *Critchfield v. Linville*, 140 Mo. 191; *Broyles v. Eversmeyer*, 262 Mo. 384.

Reed & Harvey for respondent.

(1) The court properly sustained defendants' motion to strike out the amended petition as a departure, and, plaintiff declining to plead further, in dismissing the petition, for the following reasons: The Missouri and Kansas statutes do not vest a cause of action for wrongful death in the same person. The Missouri statute vests the right of recovery absolutely in the husband; the Kansas statute does not vest a right of action in the husband at all. Sec. 4217, R. S. 1919; Sections 7323 and 7324, General Statutes of Kansas; Rail-

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way Co. v. Ryan, 62 Kan. 682; Shawnee v. Motesenbacher, 138 Pac. (Okla.) 790; Jeffries v. Farmers' Union, 103 Kan. 782; Jones v. Railway Co., 178 Mo. 541.

(2) So absolutely different is the Kansas statute from the Missouri statute that the courts of Kansas will not enforce the Missouri act. Mathewson v. Ry. Co., 61 Kan. 667; Metrokas v. Ry., 137 Pac. (Kan.) 953.

(3) So absolutely different is the Kansas statute from the Missouri statute that under the former a plaintiff may not settle his case. Jeffries v. Farmers' Union, 103 Kan. 787, 176 Pac. 631. (4) The same evidence does not support both petitions, nor is the measure of damages the same. Liese v. Meyer, 143 Mo. 555; Cytron v. Transit Co., 205 Mo. 703; Grigsby v. Barton, 169 Mo. 225; Scoville v. Glasner, 79 Mo. 449; Vaughan v. Ry., 65 Kan. 685. (5) The Kansas statute is a reproduction of Lord Campbell's Act; the Missouri statute is not. Crumpley v. Railroad, 98 Mo. 34; King v. Ry. Co., 98 Mo. 235.

WALKER, J.—This is an action brought in the Circuit Court of Jackson County, for damages for the death of plaintiff's wife, by reason of the alleged negligence of the defendants. The latter, in addition to the Railway Company, are E. K. Brown and Charles F. Dinklage, doing business as the Automobile Livery Company. The substantial allegations of the plaintiff's petition are that the defendant Railway Company was, at the time of the accident which resulted in the death of plaintiff's wife, operating a line of interurban railway, between Kansas City, Missouri, and Olathe, Kansas; that the individual defendants were at the time operating an automobile line for the carrying of passengers for hire, between Rosedale, Kansas, and Kansas City, Missouri; that plaintiff's wife at the time of the accident was a passenger on one of said automobiles for the purpose of being carried from the Elm Ridge Golf Club, in Kansas, to her home in Kansas City, Missouri; that the

individual defendants, thus operating said automobile line, engaged and undertook to carry plaintiff's wife as a passenger from said golf club to her home; that while said automobile in which plaintiff's wife was at the time being carried was moving eastwardly at a point in said city of Rosedale, and was approaching a point on 43rd Street, in said city, where the tracks of the defendant Railway Company crossed said street, an employee of the individual defendants so negligently and carelessly operated said automobile that it collided with one of the railway defendant's cars, then and there being operated by employees of said Railway Company; that as a result of said collision, plaintiff's wife was thrown violently to the ground and her skull crushed, from which injury she died; that her death was caused by the negligence of the defendant Railway Company and the individual defendants, acting through their servants, agents and employees; that the motorman in charge of the street car of the defendant Railway Company was negligent, in that he failed and omitted to give any warning while approaching 43rd Street, or while crossing the same; that he was, at the time, negligently and carelessly operating said street car at a high, reckless and dangerous rate of speed. That an ordinance of the city of Rosedale prohibited said defendant railway company from operating its cars at a point where plaintiff's wife received her injuries, at a greater rate of speed than fifteen miles per hour.

Other allegations of the negligence of said motorman are, that he failed to keep said street car under reasonable control so as to avoid a collision with vehicles that might be passing along 43rd Street and across the tracks of said street car line; that by the exercise of reasonable care he could have seen said automobile approaching the point where said street car tracks crossed said street and could have stopped said car or slackened its speed in time to have avoided a collision with said automobile; that by the exercise of ordinary

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care, said motorman realized or could have realized that, if he did not stop or slacken the speed of said car, said collision would occur; and that he failed and neglected so to do.

Actual damages for \$10,000 are asked against the defendants.

On the day the case was set for trial, the defendant Railway Company, having theretofore filed as its answer a general denial and a plea of contributory negligence, filed by leave of court an amended answer, alleging that the accident which resulted in the death of plaintiff's wife occurred in the State of Kansas, and that there was at the time no statute in force in that State similar to the Missouri statute under which the plaintiff brought his suit, and that he had, therefore, no right of action under the laws of this State. In this amended answer the plea of contributory negligence was abandoned, and the allegation concerning the Kansas statute substituted. On the same day the plaintiff, by leave of court, filed an amended petition, which was the same as the original, except that it was alleged therein that certain statutes, to-wit, Sections 7323 and 7324 and Section 11829, were in force in the State of Kansas at the time of the accident, as follows:

"Section 7323. When the death of one is caused by the wrongful act or omission of another, the personal representatives of the former may maintain an action therefor against the latter, if the former might have maintained an action had he lived, against the latter for an injury for the same act or omission. The action must be commenced within two years. The damages cannot exceed ten thousand dollars, and must inure to the exclusive benefit of the widow and children, if any, or next of kin, to be distributed in the same manner as personal property of the deceased.

"Section 7324. That in all cases where the residence of the party whose death has been or hereafter shall be caused as set forth in the next preceding section, is or

has been at the time of his death in any other state or territory, or when, being a resident of this State, no personal representative is or has been appointed, the action provided in said action may be brought by the widow, or where there is no widow, by the next of kin of such deceased.

"Section 11829. The common law as modified by the constitutional and statutory law, judicial decisions and the conditions and wants of the people, shall remain in force in aid of the general statutes of this State; but the rule of the common law, that statutes in derogation thereof shall be strictly construed, shall not be applicable to any general statute in this State, but such statutes shall be liberally construed to promote their object."

"That said plaintiff and his intestate were residents of the State of Missouri on the 16th day of August, 1914, and that no personal representative of deceased was appointed in the State of Kansas, or elsewhere, and that the plaintiff was the husband and next of kin of said deceased."

Thereupon, the defendant Railway Company moved to strike out the amended petition, alleging that it constituted a departure from the original cause of action. This motion was sustained. Plaintiff refused to plead further. There was a judgment for the defendants and after the formal procedure necessary thereto, the case was appealed by the plaintiff to this court.

I. The gist of this action is for a breach of duty on the part of the defendants. The original petition shows that the collision which resulted in the death of plaintiff's wife occurred in the State of Kansas. The duty or obligation created by law and arising under the facts which the defendants owed to the decedent to avoid causing her death is alleged in conventional form, as well as the breach of that duty by defendants characterized as negligence, with its resultant effect. This is followed by a prayer for damages, as authorized by the statutes. This breach

Departure:
Like Statutes.

constitutes the ultimate fact upon which the action is based and is of primary importance, while the evidentiary facts are of secondary importance.

A comparison will demonstrate that the amended petition is in no wise different from the original, except that it pleads the statutes of Kansas, defining the conditions under which a personal representative of a decedent may maintain an action for the death of the latter; the maximum amount of damages that may be recovered therefor; to whom they shall inure; and that the widow of a decedent may sue where no personal representative has been appointed; declaring the extent to which the common law is in force in Kansas and that the plaintiff and the decedent were residents of the State of Missouri at the time of the accident, which resulted in her death. The allegations, therefore, as to the ultimate fact, or the cause of the death, are the same in both petitions.

The ground of the defendant's objection to the amended petition on which the circuit court based its ruling, striking out the same, must, therefore, find its support in the Kansas statute incorporated therein. Preliminary to the determination of this fact, the correctness of the general rule where applicable, may be conceded, that where a suit is brought under the statute of one state an amendment to the petition based on the statute of another state will be construed to constitute a statement of a new and different cause of action. [Bolton v. Ga. Pac. Ry. Co., 83 Ga. 659; Boston & Me. Ry. Co. v. Hurd, 108 Fed. 116.]

The rule thus announced is to be construed subject to the qualification that a well defined change in the cause of action pleaded by the amendment, from that originally brought, must appear as in any other case. For example, the rule as applied in the Bolton case, *supra*, is made dependent upon the fact that the amendment changed an action founded on a common law right, to one based on a statute. A like fact sustains the application of the rule in the Boston & Maine case, *supra*;

these cases sufficiently illustrate the application of the rule as applied to an amendment pleading another statute than that on which the action was originally based; from them it appears, as it does in other cases where the facts are similar, that it is not the fact that the amendment pleads another statute than that on which the action was brought, which renders the rule applicable, but that another and a different cause of action is thereby set up. It is not whether a change from law to law changes the cause of action, but whether the facts essential to constitute the cause of action are the same or different in the two pleadings.

As determinative of the effect of the incorporation in the amended petition of the Kansas statutes, it is necessary to consider the nature of the original action. Measured by its allegations from which we must determine the object and purpose of the pleader, and hence the character of the proceeding, we find that the right of the plaintiff to sue is found in Section 4219, Revised Statutes 1919, and that the liability of the defendants is defined in Section 4218, Revised Statutes 1919. The formal allegations of the petition as to the duty owing by defendants to the decedent; the breach of such duty; and that such breach caused by the death of the decedent; and the nature and amount of the damages prayed for indicate, in the language employed, that the action was based on said Sections 4218 and 4219, rather than upon Section 4217, Revised Statutes 1919. A comparison of the subject-matter of these statutes, with that of the Kansas statutes pleaded in the amended petition, discloses no material difference between them.

The subject-matter and purpose of the two statutes being the same, if the original petition stated a cause of action under the Missouri statutes, it likewise, although imperfectly, stated a cause of action under the Kansas statutes. This is true, because it is evident from the comparison of these two petitions that the character of the proof required; the measure of the

damages; and the judgment authorized to be rendered upon a finding for the plaintiff, are the same in both cases. Under such circumstances, the basis for the contention that such a departure, due to an alleged dissimilarity in the statutes, was created by the amendment as to change the cause of action, is of exceeding tenuity.

II. There is no dearth of authority to sustain the conclusion that a petition which states a cause of action imperfectly, may be amended so as to cure the defect without running counter to the rule forbidding a departure. In *Cravens v. Gillilan*, 73 Mo. l. c. 528, *Sherwood, J.*, speaking for the court in a quotation from *Chitty's Pleading*, that storehouse of legal learning on the subject, said: "Matter which maintains, explains and fortifies the declaration or plea, is not a departure." Later, in *Hoover v. Railroad*, 16 S. W. (Mo.) l. c. 482, the same judge tersely said that "matter which maintains a pleading is not a departure therefrom."

In *Schroeder v. Edwards*, 205 S. W. (Mo.) 47, it was held that an amended petition of judgment creditors of an Illinois corporation against former stockholders against whom creditors had recovered judgments, by confession before the clerk of an Illinois circuit court, did not state a different cause of action from a petition alleging judgment to have been recovered in the circuit court.

Here and elsewhere, as the cases attest, the rule obtains that there is no departure where the matter subsequently alleged, fortifies or strengthens the position in the original pleading. This may be done by restating the cause more fully or in a more specific manner. [7 *Stan. Cyc. Proc.*, page 214.] An action brought in one state, in which the cause of action accrued in another, under statutes similar to our own. (Secs. 1162 and 1163, R. S. 1919) may be amended where the cause of action has been imperfectly pleaded,

without causing a departure. In *Martin v. Cotton Oil Company*, 194 Mo. App. 106, l. c. 117, the question here involved is discussed at some length, and among other things the court said: "The question of whether a change from law to law is or is not a change of the cause of action depends at times on the question of whether the facts essential to constitute the cause of action are the same or different in the two pleadings, rather than whether the pleader intended the one law or the other law to apply."

In *Madden v. Railroad*, 192 S. W. (Mo.) 455, where it appeared that the injury occurred in the State of Kansas and none of the allegations of the petition referred to the existence of a Kansas statute, the court clearly indicates, without directly ruling thereon, that where the answer of the defendant alleged by proper pleading, the terms of the Kansas statute bearing on the right of the plaintiff to recover, upon the facts stated in his petition, that the proper course of the plaintiff, instead of replying by a general denial and proceeding to trial, was to amend his petition so as to set forth the statute of Kansas creating the cause of action upon which he sought to recover.

In *Hanson v. Springfield Traction Co.*, 226 S. W. (Mo.) 1, this court in effect holds that an amendment of a petition pleading the violation of a city ordinance was proper and that the trial court erred in striking the same out. In reversing and remanding the case, Goode, J., speaking for the court, at page 3, said: "The new ground of recovery set up on the amended petition based on violations of the city ordinances did not constitute a departure or the substitution of a new cause of action. What is relied on in support of the contention that it did, is that other evidence, to-wit, proof of the city ordinances, would be required to establish it that was not needed to establish a case under the first petition. That a new cause of action is substituted by an amendment, unless the same evidence will support it that would

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have supported the original cause of action, must mean that the same evidence will establish the event or transaction declared on as the cause of action in the original petition and in the amended one—will show the two pleadings are based on the same occurrence. It cannot mean that every detail and every item of the evidence must be exactly the same, or otherwise, the right of amendment would be of little use. [Walker v. Railroad, 193 Mo. 453, 477 et seq., 92 S. W. 83; Clothing Co. v. Railway Co., 71 Mo. App. 241; Stewart & Jackson v. Van Horne, 91 Mo. App. 647.]”

In Cunningham v. Patterson, 89 Kansas, l. c. 689, the court in ruling upon this question said: “The existence and contents of the statute of another state are always capable of exact ascertainment and proof. With respect to a matter of this character the same definiteness of pleading ought not to be required as in the case of the disputable facts—the statement of the special circumstances upon which an action is founded. Anything should be regarded as sufficient which advises the defendant of the nature of the plaintiff’s claim. The bringing of the action amounts to an allegation that the statute of the place of injury authorizes a recovery, since it asserts a liability which could not otherwise exist. Here the original petition contained an allusion to the Missouri statute, for it expressly alleged that the death took place within six months prior to the commencement of the action, a statement having no possible relevancy under the Kansas act, but pertinent to that of Missouri, which limits to that period the widow’s right to sue. The defendants were necessarily advised that the plaintiff sought a recovery under the laws of Missouri. They could not possibly have been misled by the failure to set out the statute. The amended petition did not state a new cause of action. It merely amplified and corrected the statement of facts constituting the only cause of action the plaintiff had or professed to have.”

In Louisville Railroad v. Pointer’s Admr., 113 Ky. 952, a petition was filed in a Kentucky Court in an action

for damages for the death of plaintiff's intestate. An amended petition was subsequently filed, setting out sections of the code of Virginia, allowing a recovery by a personal representative of one whose injuries had resulted in death and providing for the apportioning of damages. The Court of Appeals of that State held that the amendment was germane in that it supplied a lacking element of the original cause of action otherwise sufficiently pleaded.

In *Tex. & Nor. Railroad Co. v. Gross*, 128 S. W. (Tex. Civ. App.) 1173, the original petition by the parents of the deceased, in an action to recover for his death occurring in another jurisdiction, the State of Louisiana, alleged as damages the pecuniary loss sustained by them from the son's death and also the damages which deceased himself had suffered, as surviving to plaintiffs, both under these statutes of the state where the cause of action accrued, and the statutes of the forum. In an amended petition the latter claim for damages was abandoned, and plaintiffs alleged that by the statute law of the State where the cause of action accrued they were given a right of action against defendants for the damages sustained by them, by the death of their son, caused by defendant's negligence, which statute is similar to that of the forum, giving parents a right of action for the death of their son, as a result of negligence; *held*, that the amendment was properly allowed and did not set up a new cause of action.

In *Nashville Ry. Co. v. Foster*, 78 Tenn. 351, the personal representative of a deceased brought suit in Tennessee against a railroad company for killing his intestate; there was a trial and verdict for plaintiff; a new trial was granted, it having been developed that the killing took place in Alabama. An amended declaration was then filed averring the venue in Alabama and pleading the statute of that state. Defendant pleaded to the amended declaration, the Statute of Limitations of one year; it was held that the amendment neither changed the cause of action nor the parties to the suit, nor did

it deprive the defendant of any defenses which he had to the original suit, and that the amendment related to the issuance of the original summons and was issued one year after the killing.

In *Walsh v. Walsh*, 68 So. (La.) 392, a non-resident married woman was sued by attachment on a note executed by herself and her husband in Dublin, Ireland. The petition disclosed on its face that plaintiff's cause of action arose under and must be determined by the laws of Ireland; it was held that the trial court properly allowed plaintiff to amend during the trial so as to allege that the defendant was bound on the note, under the laws of Ireland; and that the trial judge erred in dismissing the amended petition.

In *Lammers v. Chicago Gr. West. Railroad Co.*, 175 N. W. 311, in an original petition to recover for personal injuries, an amendment pleading the Employer's Liability Act, made more than two years after the accrual of the cause of action, was held to relate back to the original petition and did not constitute a departure. -

In *Jorgensen v. Grand Rap. Ry. Co.*, 189 Mich. 537, the original petition contained no allegation that the defendant was engaged in interstate commerce, but on the contrary pleaded a cause of action under the Michigan Employer's Liability Act. By an amendment filed more than two years after the cause of action arose, plaintiff alleged that the defendant owned and was at the time the injury was received, operating a railway system extending through the States of Michigan and Indiana. The court held that this amendment related back to the original petition and did not state a new cause of action.

In *Robinson v. Railway Co.*, 90 Kan. 426, a plaintiff by leave of court filed an amended petition reciting therein substantially the same facts as in her original petition, and added allegations as to the non-residence of the deceased and the authority to bring the

action under the laws of another state. It was contended that no cause of action was stated in the original petition, because the plaintiff therein did not sue as the personal representative of the deceased, and it did not appear that she had the right to bring the action in her own name until the non-residence of the deceased at the time of the accident and the laws of the State of Colorado were pleaded in the amended petition. The trial court overruled this contention and held that the amendment was proper and did not constitute a new cause of action. This ruling was upheld by the Supreme Court.

In *Stewart v. B. & O. R. R. Co.*, 168 U. S. 445, it was held: "An action may be maintained in the District of Columbia to recover damages for a death caused by negligence in Maryland, since in both jurisdictions the statutes have removed the common-law obstacle to such a suit, and permitted a recovery for the benefit of the near relatives of the deceased. The fact that in Maryland the action must be brought in the name of the State, while in the District it is brought in the name of the personal representative, or the fact that the Maryland statute names as beneficiaries the wife, husband, parent, and child of the deceased, while the District statute provides for a distribution of a recovery according to the statute of distribution, does not show such an inconsistency between the two statutes as would prevent the maintenance of the suit."

In *Seaboard Air Line Ry. Co. v. Renn*, 241 U. S. 1. c. 292, in ruling upon the propriety of an amendment to a petition similar in its material features to that at bar, the Court said: "The original complaint was exceedingly brief and did not sufficiently allege that at the time of the injury the defendant was engaged and the plaintiff employed in interstate commerce. . . . The defendant's objection was that the original complaint did not state a cause of action under the act of Congress, that with the amendment the com-

plaint would state a new cause of action under that act, and that, as more than two years had elapsed since the right of action accrued, the amendment could not be made the medium of introducing this new cause of action consistently with the provision in Section 6 that 'no action shall be maintained under this act unless commenced within two years from the day the cause of action accrued.' Whether in what was done this restriction was in effect disregarded is a Federal question and subject to re-examination here, however much the allowance of the amendment otherwise might have rested in discretion or been a matter of local procedure. . . . If the amendment merely expanded or amplified what was alleged in support of the cause of action already asserted, it related back to the commencement of the action, and was not affected by the intervening lapse of time. . . . But if it introduced a new or different cause of action, it was the equivalent of a new suit, as to which the running of the limitation was not theretofore arrested. . . . The original complaint set forth that the defendant was operating a line of railroad in Virginia, North Carolina, and elsewhere, that plaintiff was in its employ, that when he was injured he was in the line of duty and was proceeding to get aboard one of the defendant's trains, and that the injury was sustained at Cochran, Virginia, through the defendant's negligence in permitting a part of its right of way at that place to get and remain in a dangerous condition. Of course, the right of action could not arise under the laws of North Carolina when the casual negligence and the injury occurred in Virginia; and the absence of any mention of the laws of the latter state was at least consistent with their inapplicability. Besides, the allegation that the defendant was operating a railroad in states other than Virginia was superfluous if the right of action arose under the laws of that state, and was pertinent only if it arose in interstate commerce, and

therefore under the act of Congress. In these circumstances, while the question is not free from difficulty, we cannot say that the court erred in treating the original complaint as pointing, although only imperfectly, to a cause of action under the law of Congress. And this being so, it must be taken that the amendment merely expanded or amplified what was alleged in support of that cause of action, and related back to the commencement of the suit, which was before the limitation had expired."

In *Tiffany on Death by Wrongful Act* (2 Ed.), sec. 202, it is said: "The plaintiff whose right of action arises under a foreign statute must allege and prove it. Where the declaration sets out a good cause of action according to the law of the forum without alleging that the killing was in the state, the declaration will be held good as setting out a cause of action arising within the state. If the declaration fails to allege the foreign statute, an amendment alleging it is not open to the objection that it sets up a new cause of action, although the period of limitation prescribed by the foreign statute has elapsed." This rule is in harmony with that announced in other treatises on the same subject.

From all of which it appears that the courts and the texts are in accord in holding that such an amendment as was made in the instant case is proper.

III. While the power of the courts in regard to the amendment of pleadings had its origin in the common law, this power has been given legislative recognition in many states, the effect of which is to amplify and liberalize the courts' rulings in that regard, limited only by sound judicial discretion applicable to the facts in each particular case.

The statute of this State authorizing such amendments is exceedingly liberal and provides that: "The court may, at any time before final judgment, in furtherance of justice, and on such terms as may be prop-

Liberal
Statute.

er, amend any record, pleading, process, entry, return or other proceedings, by adding or striking out the name of any party, or by correcting a mistake in the name of a party, or a mistake in any other respect, or by inserting other allegations material to the case, or when the amendment does not change substantially the claim or defense, by conforming the pleading or proceeding to the facts proved." [Sec. 1274, R. S. 1919.]

The liberal trend of this statute prompts epigrammatic interpretation of same that the rule is to allow amendments; the exception to refuse them; and that the court should not be less liberal in the construction of the statute than it is in its declarations. [Corrigan v. Brady, 38 Mo. App. l. c. 657; House v. Duncan, 50 Mo. 453; Lottman v. Barnett, 62 Mo. 159; Ensworth v. Barton, 67 Mo. 622; Carr v. Moss, 87 Mo. 447.]

The discretion of the trial court as exercised under the ample provisions of this statute should not be interfered with unless it appears that it has been abused or, in other words, that the defendants have suffered injury by reason of the amendment. [Wright v. Groom, 246 Mo. 158; Broyles v. Eversmeyer, 262 Mo. 384.]

With these textual declarations for our guidance, let us inquire how, or in what manner the amendment complained of, injured the defendants, this evidently

being the limit in construing the power conferred by the statute in addition to that already possessed under the common law.

**Injuring
Defendant.**

The amendment did not require a different character of evidence from that necessary to support the original petition; the measure of damages and the identity of the subject-matter is the same in both petitions and a judgment rendered upon either would have constituted a complete bar to an action on the other. In the presence of these facts, there is nothing left upon which to base a contention that the amended plead-

ing sought to impose any burden or demanded the satisfaction of any obligation other than that prayed for in the original petition. Construing the amendment, therefore, in the light of the statute, we find nothing therein which violates the rule prohibiting a departure and the consequent statement of a new cause of action.

IV. The amendment of which the defendants complain was rendered necessary by their tendering an issue on the eve of the trial. Under such circumstances they are in no position to complain. We so held in *Lemon v. Chanslor*, 68 Mo. 340; a like conclusion was reached in *Hoover v. Railroad*, 16 S. W. (Mo.) 480, where it is said that an amendment is permissible when it controverts or avoids new matter set up by way of defense.

In an early Connecticut case, it was held that where defendant by his plea in bar had rendered it necessary that the plaintiff amend his pleading to entitle him to a recovery, that such amendment might be made by replication and would not constitute a departure. [*Fowler v. Macomb*, 2 Root (Conn.) 388.]

Our statute (Section 1274, *supra*) renders the rule in the Connecticut case as to the amendment of replies applicable to petitions.

In *Friederichsen v. Renard*, 247 U. S. 207, it was held that where a plaintiff was compelled by an order of the court to change his suit in equity for cancellation of a contract and debt, to a suit at law for damages because of fraud, it did not constitute a departure so as to warrant the striking out of the petition or the application of the Statute of Limitations to the suit for damages. In the instant case, the plaintiff was compelled to ask for permission to amend his petition by the act of the defendants or rather by the act of the court in permitting the defendants to file an amended answer on the eve of the trial, and, consequently it comes within the rule announced in the *Friederichsen Case*, *supra*.

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We have reviewed with care the cases cited and conclusions drawn therefrom in the defendants' brief and do not find that they sustain the action of the circuit court in dismissing the plaintiff's petition; its judgment is, therefore, reversed and the cause remanded with directions to set aside the order of dismissal herein, and to reinstate this case for trial.

All concur.

CITY OF BRUNSWICK ex rel. GEORGE W. BARKWELL et al. v. OTTO K. BENEKE, Appellant.

Division Two, July 19, 1921.

1. **APPELLATE JURISDICTION: Transfer by Court of Appeals.** Where a case has been transferred to the Supreme Court for the reason that one of the judges of the Court of Appeals believes its decision therein is in conflict with a decision of another Court of Appeals in another case, it is the duty of the Supreme Court to hear and determine the case as it would any other case in which it had obtained jurisdiction by ordinary appellate process, and the question of conflict drops out of the case.
2. **NOTICE BY PUBLICATION: Two Consecutive Weeks.** The statute required that the resolution authorizing a street improvement should be published in some newspaper "for two consecutive weeks; and if a majority of the resident owners of the property liable to taxation therefor shall not, within ten days from the date of the last insertion of said resolution, file with the city clerk their protest against such improvement, then the board of aldermen shall have power to cause such improvements to be made and contract therefor." The resolution was adopted on May 3rd, and was published in a weekly newspaper on May 7th and 14th, and on May 25th an ordinance requiring the improvement to be made and the contract to be entered into was adopted. *Held*, that the statute required that the resolution should be published for full two weeks, or fourteen days, and as ten days intervened between its last publication on May 14th and the adoption on May 25th of the ordinance requiring the improvement to be made and the contract to be let, the requirements of the statute were met. Where the statute requires the resolution to be published for

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"two consecutive weeks," and allows property owners ten days thereafter in which to protest, it is not necessary, in order to constitute two consecutive weeks, that the resolution be inserted for three weeks in the weekly newspaper, but where the resolution is inserted the second time ten days before the council passes an ordinance authorizing the improvement, that is sufficient publication. [Overruling *Munday v. Leeper*, 120 Mo. 417.]

3. **STREET IMPROVEMENT: According to Established Grade: Specification.** A resolution adopted by the board of aldermen reciting that "the surface of the roadway when said work is completed shall be at the established grade thereof, all according to plans, profiles and specifications therefor filed by the proper officer with the city clerk of said city," and profiles showing the cuts and fills necessary to bring to the established grade the part of the street to be graded and paved, duly filed, sufficiently comply with the requirements of the statute (Sec. 9411, R. S. 1919) requiring the resolution to include and describe the work of bringing the street to the established grade.
4. ———: **Notice to Begin Work: Waiver: Completion of Work.** Where the ordinance provided that the street improvement should begin within one week from the delivery to the contractor of written notice, said notice can be waived, and where no notice is given the time for completing the work is to be counted from the date he actually began work.
5. ———: **Not Completed Within Required Time: Void Tax Bill.** Where the ordinance provided that the street improvement should begin within one week from the delivery to the contractor of written notice, and be fully completed within sixty days, and no notice was given, but he began work on June 28th and completed the improvement on November 10th, a period of 135 days, no extension being granted or requested, the tax-bills issued to the contractor in payment for the improvement were void.
6. ———: ———: **Provisions for Interference.** Time is of the essence of a contract requiring a street improvement to be completed within a specified time, and material; and where no cause appears for the delay and for aught that appears the work was needlessly delayed, any provision in the contract that days lost on account of injunction suits, bad weather and strikes should not be counted, not being invoked or if invoked wholly inapplicable, does not relieve against the requirement for a completion of the improvement within the prescribed time.

Appeal from Chariton Circuit Court.—*Hon. Fred Lamb,*
Judge.

REVERSED.

F. C. Sasse and O. P. Ray for appellant.

(1) The preliminary resolution was not published for two consecutive weeks, as required by Sec. 9411, R. S. 1909. State ex rel. v. Tucker, 32 Mo. App. 620; State v. Dobbins, 116 Mo. App. 29; Williams v. Ettenson, 178 Mo. App. 178; Munday v. Leeper, 120 Mo. 418; Young v. Downey, 150 Mo. 324, 330. It requires seven complete days to constitute a week. State ex rel. v. Tucker, 32 Mo. App. 620; State v. Dobbins, 116 Mo. App. 29; Russell v. Croy, 164 Mo. 69. The time within which an act is to be done, shall be computed by excluding the first day and including the last. Sec. 8057, R. S. 1909. The above section applies and is the rule for notices by publication, and the first day of publication is excluded and the last day included. State ex rel. v. Tucker, 32 Mo. App. 620; Gray v. Worst, 129 Mo. 130; Young v. Downey, 150 Mo. 330; State v. Dobbins, 116 Mo. App. 29. To publish anything for a certain length of time means that the publication must not cease, but must continue until that time has run. State v. Dobbins, 116 Mo. App. 20; Ratliff v. Magee, 165 Mo. 466. That there is a recognized difference in the length of time requiring a resolution to be published for two consecutive weeks, and a section requiring the resolution to be published in two consecutive insertions, is shown by comparing Sec. 9411 and Sec. 9255, R. S. 1909, the former applying to cities of the fourth class, and the latter to cities of the third class. And there was a difference in the length of time for publication of the resolution, between the two above sections, and so recognized by our Legislature, appears by repeal of Sec. 9411, and enacting a new section in lieu thereof, and changing the same to read, "shall cause to be published in *two consecutive insertions*." (2) The preliminary resolution declaring the work and improvement necessary to be done, did not describe the

work of bringing the street to the established grade, as provided for and required by Sec. 9410, R. S. 1909. *Kirksville v. Coleman*, 103 Mo. App. 219; *Kansas City v. Askew*, 105 Mo. App. 86; *Smith v. Westport*, 105 Mo. App. 221; *Phoenix Const. Co. v. Gentry County*, 257 Mo. 392; *Const. Co. v. Whitmer*, 206 S. W. 387. Since the publication of the resolution is the only provision of the statute for notifying the property owners of what the council proposes to do, it should either be explicit in itself, or inform the property owner where he can ascertain exactly what is proposed. *Webb City v. Ayler*, 163 Mo. App. 155; *Const. Co. v. Gentry County*, 257 Mo. 392, approving *City of Kirksville v. Coleman*, 103 Mo. App. 215. (3) The work and improvement was not completed within the time required by the ordinance of the city, and no extension of time was granted by ordinance to the contractor. *Smith v. City of Westport*, 105 Mo. App. 225; *McQuiddy v. Brannock*, 70 Mo. App. 535; *Barber Asphalt Co. v. Ridge*, 169 Mo. 376. The clause providing a penalty cannot change or extend the time for completing the work. *McQuiddy v. Brannock*, 70 Mo. 535; *Neil v. Gates*, 152 Mo. 592; *Heman v. Gilliam*, 171 Mo. 268. The clause in the contract providing for working days lost in consequence of injunction, court proceedings, etc., cannot be considered in this case, for the reason that none of these grounds were pleaded in plaintiff's reply or any other pleading, for the further reason that there was no evidence offered whatever that any of these grounds had caused the delay. The ordinance and contract provide for the same time for completing the work, but the contract requires that any additional time allowed shall be fixed by an ordinance of the city.

E. C. Anderson and *Russell E. Holloway* for respondents.

(1) The publication of the preliminary resolution for the two consecutive weeks in the *Brunswicker*, viz.,

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May 7 and 14, 1915, was a sufficient publication to satisfy the statute. *Haywood v. Russell*, 44 Mo. 254; *Fleming v. Tatum*, 232 Mo. 678; *Ratliff v. Magee*, 165 Mo. 465; *Brown v. Howard*, 264 Mo. 501; *Young v. Downey*, 150 Mo. 323; *Russell v. Croy*, 164 Mo. 69; 37 Cyc. 512; 28 Cyc. 1007; *Webb v. Stroback*, 143 Mo. App. 469; *Trenton v. Collier*, 68 Mo. App. 494; 29 Cyc. 1121; 12 C. J. 513, note 84; *Ricketts v. Hyde Park*, 85 Ill. 110, 13 L. R. A. (N. S.) 197; *State v. Johnson Co.*, 138 Mo. App. 429, 122 S. W. 316; *State v. Brown*, 130 Mo. App. 214, 109 S. W. 99; *Gray v. Worst*, 129 Mo. 122, 131; *State v. Polk*, 144 Mo. App. 329, 127 S. W. 933. (2) The preliminary resolution was sufficient to fully advise all property owners of the nature of its improvement, manner and material to be used. *Blair v. Glenn*, 187 Mo. App. 392; *Muff v. Cameron*, 134 Mo. App. 607; *Const. Co. v. Gentry Co.*, 257 Mo. 392, 395; *Haughamont v. Bonijughl*, 83 Pac. 54; *Haughamont v. Raymond*, 83 Pac. 53; *Kirksville v. Coleman*, 103 Mo. App. 215, 218; *Inv. Co. v. Lewis*, 271 Mo. 317. (3) The improvement was completed within a reasonable time and within the time provided by ordinance. *Hund v. Rackliffe*, 119 Mo. 312; *Boulton v. Kolkmeier*, 97 Mo. App. 530; *Gist v. Const. Co.*, 224 Mo. 379; *Hilbert v. Paving Co.*, 107 Mo. App. 385, 398; *Carlin v. Cavender*, 56 Mo. 256; *Inv. Co. v. Hall*, 255 Mo. 681.

Willard P. Cave and *E. C. Anderson* for respondents.

(1) The statute requiring publication for two successive weeks has been held to be complied with by publication on the 7th and 14th of the same month. 2 Jones on Taxation by Assessment, sec. 763, p. 1315; *Ricketts v. Village of Hyde Park*, 85 Ill. 110. (2) If the notice is published in a weekly newspaper it is not necessary that it shall be for two full weeks. 2 Jones on Taxation by Assessment, sec. 763, p. 1315; *Brewer v. Springfield*, 97 Mass. 152; *Webb v. Stroback*, 143 Mo.

App. 459; Russell v. Croy, 164 Mo. 69. (3) In Springfield v. Weaver, 137 Mo. 667, the Supreme Court expressly holds that the order in which the various steps taken necessary to make the improvements is not a matter of substance and should not invalidate the tax. The resolution was sufficient in substance. (4) It was admittedly published for two consecutive insertions in a weekly newspaper, and hence, at some time the two publications had performed their function, which was to notify the resident property owners. And there was no protest filed in this case. Hence, after the lapse of the statutory time after the last publication, and no protest filed, the city had jurisdiction to proceed to make the improvement. Webb v. Strobach, 143 Mo. App. 459; Russell v. Croy, 164 Mo. 69.

HIGBEE, P. J.—This case was transferred to this court by the Kansas City Court of Appeals for the reason that one of the judges believed the decision of that court was in conflict with the decision of the Springfield Court of Appeals in Webb v. Strobach, 143 Mo. App. 459, 470. Under the Constitution it is our duty to hear and determine the cause as in case of jurisdiction obtained by ordinary appellate process; in other words, the question of conflict drops out of the case. [Section 6 of Amendment of 1884 to the Constitution; Epstein v. Railroad, 250 Mo. 1, 156 S. W. 699.]

The action is to enforce the lien of a special tax bill issued by the city of Brunswick, a city of the fourth class, for grading and paving a part of a public street, against the property of the appellant abutting on said street and liable to taxation therefor. On May 3, 1915, the board of aldermen of the city adopted a resolution under the provisions of Section 9411, Revised Statutes 1909, declaring it necessary to bring to the established grade a designated portion of Broadway Street by fills or excavations, as may be necessary, and to pave the same with vertical fiber paving blocks and asphalt filler,

all upon a concrete base, four inches thick, according to specifications therefor filed by the proper officer with the city clerk of said city. It directed that the resolution be published for *two consecutive insertions* in the "Brunswicker," a weekly newspaper published in said city. The resolution was published on May 7th and 14th in said newspaper.

On May 25th, an ordinance was adopted requiring the designated portion of said street to be brought to the established grade and paved with three inch vertical vitrified paving blocks upon a four-inch Portland cement concrete base, with an asphalt filler and a one-and-a-one-half inch sand cushion, "and said improvement shall be commenced within one week from the delivery by the board of aldermen to the contractor of written notice to commence, and shall be fully completed within sixty days after the date of such notice, provided that for good cause shown the board of said city may extend the time for completing said improvement upon the application of the contractor made as soon as the necessity therefor appears and before the expiration of the time herein fixed for the completion of the same."

The relator, Barkwell, was the successful bidder, and on June 22nd, entered into a written contract with the city to do the work. It provided that no additional time for the completion of the work should be allowed except for reasons that should appear sufficient to the board; working days lost on account of injunction, court proceedings, bad weather, strikes, etc., shall not be held to be working days and shall be added to the number of days specified within which the work shall be completed; in consideration of the completion of the contract in accordance with the specifications, the contractor shall receive \$1.74 per square yard.

No notice was given the contractor to begin the work, but he did so on June 28th, and completed it November 10th. No extension of time was asked or given. The tax bill was issued November 19th. The cause was

tried to the court, and judgment rendered for the relator, Barkwell, from which the defendant appealed to the Kansas City Court of Appeals.

I. Section 9411, Revised Statutes 1909, authorizing the improvement of streets in cities of the fourth class, reads:

“When the board of aldermen shall deem it necessary to pave . . . any street . . . the board of aldermen shall, by resolution, declare such work or improvement necessary to be done, and cause such resolution to be published in some newspaper published in the city, for two consecutive weeks; and if a majority of the resident owners of the property liable to taxation therefor shall not, within ten days from the date of the last insertion of said resolution, file with the city clerk their protest against such improvement, then the board of aldermen shall have power to cause such improvements to be made and contract therefor.”

The appellant contends that three insertions are necessary to constitute a publication of the resolution for two consecutive weeks within the meaning of this section of the statute, and that resident owners of property liable to taxation for the contemplated improvements were entitled to file their protest within ten days from the date of the last insertion, which would have been June 1st. It is clear that the publication required is for full two weeks or fourteen days.

In *Haywood v. Russell*, 44 Mo. 252, 254, BLISS, J., said: “The objection to the time of publication is not well taken. The statute requires that notice should be published for four weeks, and that the last insertion should be at least four weeks before the commencement of the term. If the first publication is for one week, surely the other three are for one week each, and it is only necessary that ‘the last insertion’—not the last week—should be four weeks before the term. The notice objected to was published in a weekly paper, in four consecutive numbers, which makes four weeks. The ob-

jection assumes that the commencement of the publication should be eight weeks before the term, which is not required, nor is it required that the four weeks should end four weeks before the term. It is sufficient if it be for four weeks, and if the last insertion, which is the commencement of the fourth week, be four weeks before the commencement of the term." WAGNER and CURRIER, JJ., concurred.

In *Cruzen v. Stephens*, 123 Mo. 337, the defendant contended that a judgment for delinquent taxes was void because the notice of publication to the defendant was not published for four consecutive weeks. It appeared in the issues of the newspaper designated on March 7, 14, 21 and 28, 1889. In the opinion of BARCLAY, J., concurred in by all the members of Division One, it is said:

"Defendants argue that publication four times, at these intervals, is not publication for 'four weeks'; and cite the argument of the Court of Appeals in *State ex rel. v. Tucker* (1888), 32 Mo. App. 620, claiming that the latter demonstrates that the ruling on this subject in *Haywood v. Russell* (1869), 44 Mo. 252 (where such a publication was held good), is unsound, and should not be followed.

"Whatever we might think of the ruling in the forty-fourth report as an original proposition, it has been acquiesced in so fully, and been treated as a settled point of practice in making publications in all sorts of proceedings, for so many years, that we decline to re-examine it. We consider that the rule it declares has become a rule of property, on the faith of which great numbers of titles, founded on judicial sales, depend."

Ratliff v. Magee, 165 Mo. 461, is in point. Syllabus 1 reads: "The statute required that the notice for the final settlement of an estate should be 'published for four weeks' prior to the term. *Held*, that this statute required a notice to be published for four weeks or twenty-eight days prior to the beginning of the term, but did not require that four weeks should intervene between

the date of the last publication of the newspaper and the first day of the term; and, hence, a notice published in a newspaper on March 24, March 31, April 7, and April 14, prior to the beginning of the term on May 8, met the requirements of the statute and was sufficient."

The opinion was by VALLIANT, J., in which all the members of Court in Banc concurred on the point in question.

In *Fleming v. Tatum*, 232 Mo. 678, the order of publication in a tax suit was published on June 8, 15, 22 and 29. It was held, in an opinion by VALLIANT, J., to be a publication for four successive weeks.

A notice in an action against non-residents to reform and foreclose a deed of trust, was published in a daily newspaper (except Mondays) in the consecutive issues from Sunday, June 29, to July 26. The opinion, by ROY, C., in Division Two, in which all concurred, held that the notice was published for four consecutive weeks (citing and reviewing *Haywood v. Russell and Cruzen v. Stephens*, *supra*; *Young v. Downey*, 150 Mo. 317; *Howard v. Brown*, 197 Mo. 36; *Brown v. Howard*, 264 Mo. 501). It will be seen that by excluding the date of the first issue, June 29th, the publication extended over a period of only 27 days.

In *State ex rel. v. Tucker*, 32 Mo. App. 620, the notice for a local option election, held October 11, 1887, was published in a weekly newspaper on September 17, 24, and October 1 and 8. From the first insertion to the date of the election was a period of 24 days. Obviously, the notice was not published four weeks as required by statute.

In *Young v. Downey*, *supra*, it was held, approving *State v. Tucker*, that a notice published on September 8, 15, 22 and 29, when the term began October 2, was not a publication for four weeks, but only twenty-four days. BURGESS, J., quotes the rule, at page 327, from 1 Elliott's General Practice, page 450, as follows:

"Where the notice is required to be published once each week for a certain number of weeks, the full num-

ber of days necessary to constitute the requisite number of weeks must, according to the weight of authority, elapse between the date of the first publication and the return day. So, it has been held that a statutory provision requiring publication for 'three successive weeks' means that twenty-one days must elapse between the first publication and the return day, and not simply three insertions in a weekly newspaper covering only fifteen days."

Judge BURGESS, however, drew a distinction between that case and *Haywood v. Russell*, and, in effect, repudiated the *Cruzen* case. But this court, in *Brown v. Howard*, 264 Mo. 1. c. 504, expressed its approval of the *Haywood* and *Cruzen* cases. There can be no question that on the facts the *Tucker* and *Young* cases were soundly ruled.

In *Norton v. Reed*, 253 Mo. 236, the question arose over the sale of real estate by the probate court to pay debts of the decedent. The affidavit of the publisher showed that notice of the application for the order of sale was published in a weekly newspaper on April 21, 27, and May 4 and May 11. The first day of the term was May 14th, and the order of sale was made on the following day. The first insertion was only 24 days previous to the first day of the term. The court, however, entered an order reciting that the order of publication has been published for more than four weeks prior to the first day of the term. It was held that the recital referred to the publication as shown by the record and (following *Young v. Downey*, *supra*) that the notice had been published 24 days and not for four weeks, and that the order of sale and the deed made thereunder were void.

The Court of Appeals based its ruling on *Munday v. Leeper*, 120 Mo. 417, in which it was held that insertions in a weekly newspaper on August 12, 19 and 26, of notice of the granting of letters of administration, was a publication for two weeks only.

In *Ratliff v. Magee*, supra, l. c. 466, Judge VALLIANT distinguishes *Munday v. Leeper* and others from *Haywood v. Russell*, supra. He said at page 467: "These decisions are not in discord, and they are cited to show the importance of observing the difference in the context and purpose of this statute under discussion from those of other statutes in which like terms are used."

The learned Court of Appeals also relies on *State v. Dobbins*, 116 Mo. App. 29, wherein the court held, in effect, that if the notice is published in a weekly paper there should be five insertions and that a publication in four consecutive weekly issues of the paper would not meet the requirements of the statute.

In *State v. Brown*, 130 Mo. App. 214, l. c. 219, BLAND, P. J., and GOODE and NORTON, JJ., concurring, said: "The *Dobbins* case seems to assume that the notice ceases to be published the day after the paper leaves the press; that it does not continue to be published from one issue of the paper to the next succeeding one. If this were true, a notice published in a weekly newspaper four times would only give four days' notice and, to comply with the requirements of the statute, it would be necessary to publish the notice for twenty-eight days in a daily paper, or for twenty-eight weeks in a weekly newspaper. The notice, as such, when published in a weekly does not cease to impart notice the day after the paper leaves the press, but continues, within the meaning of the statute, to be published until the issuance of the next current number of the paper, or for seven days. The last insertion should be held to continue for the same length of time to impart notice of the election."

We approve this enunciation, and think the rule applicable to the question under consideration and in harmony with all other rulings of this court. *Munday v. Leeper* is out of harmony with prior and subsequent decisions. To give it our sanction would needlessly breed confusion and overrule well-considered cases that have become a rule of property, on the faith of which

many titles, founded on judicial sales, depend. The resolution was published for two consecutive weeks.

II. The resolution recites that "the surface of the roadway when said work is completed shall be at the established grade thereof, all according to plans, profiles and specifications therefor filed by the proper officer with the city clerk of said city." The fills and cuts necessary to bring to the established grade that part of the roadway of said Broadway Street proposed to be graded and paved are shown on said profile. This complies with the requirement of Section 9411, Revised Statutes 1909, as to including and describing in the resolution the work of bringing such street to the established grade. [Phoenix Brick Co. v. Gentry County, 257 Mo. 392, 396; Blair v. Glenn, 187 Mo. App. 392, 395.]

III. The ordinance provided that said improvement should be commenced within one week from the delivery to the contractor of written notice, and be fully completed within sixty days thereafter, with a proviso for extension of time for good cause shown. The contractor began the work on June 28th and completed it on November 10th, a period of 135 days.

When we consider the circumstances, it is evident that the giving of the notice provided in the ordinance was waived. While the contractor was entitled to notice to begin the work there is no reason why that formality could not be waived. The intention need not necessarily be proved by express declarations, but may be shown by the acts and conduct of the parties from which an intention to waive may be reasonably inferred. [40 Cyc. 263.]

It is agreed that no extension of time was asked or given. There was a provision in the contract that days lost on account of injunction, bad weather, strikes, etc., should not be held to be working days, but this term of the contract is not invoked, nor need be, because the

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ordinance authorized an extension for good cause. For aught that appears, the work was needlessly delayed, to the great annoyance of the public. As time was of the essence of the contract and material, the tax bill issued for the work and here sued on must be held void. The penalty proviso does not relieve against the requirement to complete the work within the time prescribed. [Neill v. Gates, 152 Mo. 585, 592; Barber Asphalt Paving Co. v. Munn, 185 Mo. 552, 569; Gilsonite Constr. Co. v. Coal Co., 205 Mo. 49, 79; 28 Cyc. 1137.]

"In French v. Wallace, 13 Wall, 506, it is said: 'When the requisitions prescribed are intended for the protection of the citizen and to prevent a sacrifice of his property, and by disregard of which his rights might be and generally would be injuriously affected, they are not directory, but mandatory. They must be followed or the acts are invalid. The power of the officer in all such cases is limited by the measure and conditions prescribed for its exercise.' Accordingly we are of the opinion that the proviso in the ordinance, requiring the completion of the improvement within a prescribed time, was mandatory, and that a compliance with it was a condition precedent to the right of the contractor to any lawful demand against the abutting landowner." [Rose v. Trestail, 62 Mo. App. 352, 358.]

In Barber Asphalt Paving Co. v. Munn, 185 Mo. 552, 568, 569, it was held that the ordinance must control, and that the failure to complete the work within the time prescribed by the ordinance rendered the tax bills void. In that case the ordinance provided that a penalty of ten dollars per day after the time fixed by the ordinance should be deducted. In Gilsonite Constr. Co. v. Coal Co., 205 Mo. 49, 79, it was said "that it was not within the power of the municipal corporation to extend the time by ordinance for the completion of the work after the time for completing it has expired," citing Neill v. Gates, 152 Mo. l. c. 592, and Hund v. Rackliffe, 192 Mo. l. c. 324, 325.

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In the case last cited, the ordinance provided that the work should be begun within ten days after the approval of the ordinance, and completed within forty days. The ordinance was approved June 12th. "They actually began work before that date, but the fact that they did so, does not reduce *pro tanto* the time for the completion of the work. The forty days for the completion of the work began to run at the expiration of the ten days allowed for the commencement of the work and not from the time the work was actually commenced within the ten days." [P. 322.] Counsel argue that since the work was to be commenced within one week from the giving of written notice and such notice was not given, *ergo*, plaintiff did not fail to complete the work within the time prescribed by the ordinance. We think there is not analogy between the cases, and that there is no merit in the contention.

The judgment is reversed. All concur.

CITY OF ST. LOUIS v. EMMA CLEGG, Appellant.

Division Two, July 19, 1921.

1. **DEDICATION OF STREET: By Grantor's Conveyance.** A dedication of a street to public use may be made in a deed from one individual to another, if sufficiently explicit in terms to indicate the grantor's purpose. Where the owner sells property within the limits of a city, and in the deed bounds it by certain designated streets, not only does the grantee acquire an easement by the grant, but the deed constitutes an offer of the use declared.
 2. ———: ———: **Call For Street: Estoppel: Available to Public.** While the rule is that an estoppel by deed, including an implied covenant, can operate only in favor of the grantee or his privies in estate, and estoppel *in pais* can operate only when representations have been made to a legal person, who has relied upon them to the extent that it would be inequitable to allow them to be withdrawn, a call for a street in a deed from one individual to another is more than a mere description, for it is an implied covenant that there is such a street, and where such individual has accepted the
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deed and acted on it in reliance upon such covenant the general public can avail itself of an estoppel in his favor.

3. ———: ———: ———: **Aided by Other Facts.** A deed from the owner of land in a city to an individual grantee designated Glades Avenue as the northern boundary of the property sold and ended the description by metes and bounds as "on the south line of said avenue;" ten days thereafter a survey, made twenty years previously by the grantor's husband, which declared Glades Avenue to be the northern boundary of the property and designated it as a proposed highway, was filed, and the presumption is reasonable that it was filed at said owner's instance; said survey remained on record unchallenged for seven years before the suit was brought to open and widen said avenue, and the grantee in said deed testified that Glades Avenue had been open for more than ten years and that he had several times driven through it. *Held*, that the deed, aided by the other facts, constituted a dedication to public use of that portion of the owner's property designated therein as Glades Avenue, and a formal acceptance was unnecessary.
4. ———: ———: **Subsequent Revocation.** After the dedication of land to a public use by the deed of the owner, an agreement between the owner and grantee, in which the former, for a consideration, agrees to sell to the latter ground described in the deed as a street, will not effect a revocation of the grant, nor be construed as indicative of another purpose than that expressed in the deed. And after the dedication has become absolute, the grantor cannot change its character by a deed of another lot to another grantee in which she describes the avenue so dedicated as a private street.
5. ———: **Fee in Dedicator.** The fact that at common law the fee in the soil over which a public highway is established remains in the owner does not affect its common law dedication to public use, which is absolute until the highway is vacated.
6. ———: **Opening Street: Damages.** Where the owner of property has parted with the fee, she is not entitled to damages for its appropriation by the city in a proceeding to open and widen a street over the same.
7. ———: **Nominal Damages.** Where the area included within a proposed public street is burdened in favor of adjacent lots with easements in the nature of a street, public or private, the owner, upon condemnation for the formal establishment of a highway thereon, is entitled to recover only nominal damages.

Appeal from St. Louis City Circuit Court.—*Hon. Kent K. Koerner*, Judge.

AFFIRMED.

W. B. & Ford W. Thompson for appellant.

(1) The appellant claims, first, as to dedication, that the authorities are uniform in regard to dedication, viz.: that three things must always inhere in every case of dedication: (a) The question of intent; (b) The fact of dedication; (c) The acceptance. The plat recorded in this case is a private plat, which had been made for a number of years before it was recorded, and it is expressly stated on the plat that this is a proposed street, never was dedicated as a street in any way; nor are there any words of dedication on the plat whatsoever. In other words, the plat does not show the dedication of the property, nor is there any unrecorded plat that shows a dedication of the property; nor is there any dedication in accordance with the statute. It is a mere proposed survey, not signed by the owner or recorded by his authority. It is signed by the surveyor, and put of record without any authority or consent of the owner shown, and there is no authority under the statutes for putting such an instrument of record, so that the instrument itself is no act of dedication. 13 Cyc. 497, 478, 479, 483, 484; *Downer v. St. Louis Ry. Co.*, 23 Minn. 271; *Coberly v. Butler*, 63 Mo. App. 556; *Field v. Mark*, 123 Mo. 502; *Balmat v. City of Argenta*, 184 S. W. 445; 1 Elliott on Roads & Streets, sec. 133. (2) The facts in this case contradict any acceptance by the city of any part or portion of Glades Avenue except the mere fact that a special tax clerk did not assess it, and treated the Cozens survey as a dedication, and it is for the court to determine whether or not after the state and city assessor, whose duty it was under the general laws and the ordinances to assess for taxation all property except public property, had assessed this property for years, the city would be entitled, upon the filing of this plat for record, to treat the filing of the plat as an acceptance and dedication of

the strip of land as a public highway, by the authority exercised by a special tax clerk who claimed that the filing of the plat was a dedication. We think there could be no controversy over such a question, and especially when a part of that same plat, on which a fifteen-foot alley is mentioned, was by this same tax clerk assessed as private property. (3) There is no evidence of a public use of this property that would constitute a dedication: (a) Because it is admitted that in 1908 the entire lot 8 of Prather's subdivision was assessed for the sewer taxes, including the strip in controversy. (b) It is also admitted that all of lot 8, including the strip in controversy, was assessed in 1911 for the paving of Forest Avenue by the system used in the special tax department of absorption. (c) Because there is no evidence that the property was open to public use for any definite time. (d) That the circumstances under which Heil's deed was made and the fact that he conceded that he fronted on a private street, would not constitute this deed, and the calls in this deed, a dedication of anything except to private use. (e) The contract made by Heil with Mrs. Clegg would be considered nothing more than a dedication to private use, which is not authorized. (f) All the evidence relating to the assessment and collection of taxes by the city, both general and special, against the land in controversy, and the payment thereof by the owner, is to be considered as circumstances in connection with all other facts in evidence on the issue of whether the public user was permissive or hostile and adverse. *St. Louis v. Woodwork Co.*, 216 S. W. 944; *Coberly v. Butler*, 63 Mo. App. 556; *Fields v. Marks*, 125 Mo. 502.

Charles H. Daues, H. A. Hamilton, and G. Wm. Senn for respondent.

(1) Upon deed of conveyance for property bounded by a street, the reversion in the fee to the adjacent part of the street passes to the grantee with the fee to the

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lot described as conveyed—i. e., in the absence from the deed of words of expression, or of necessary implication, of the exception by the grantor from the conveyance of the fee in the adjacent street. *Baker v. St. Louis*, 75 Mo. 671; *Snoddy v. Bolen*, 122 Mo. 479, 485, *Grant v. Moon*, 128 Mo. 48; *Thomas v. Hunt*, 134 Mo. 401; *Impr. Co. v. Railroad*, 255 Mo. 519; 525; *Cochrane v. Ry. Co.*, 94 Mo. App. 473; *Restetsky v. Railroad*, 106 Mo. App. 387. (2) Where the area included within the proposed public street is burdened in favor of adjacent lots with easements in the nature of a street use, private or public, the owner is entitled upon condemnation for formal establishment of a highway to recover nominal damages only: *McKee v. St. Louis*, 17 Mo. 191; In the matter of *Lewis Street*, 2 Wend. 472; *Olean v. Steyner*, 135 N. Y. 341; In the matter of *Adams*, 141 N. Y. 297; *Stetson v. Bangor*, 60 Me. 313, 321; *Bartlett v. Bangor*, 67 Me. 464; *Crowell v. Inhabitants of Beverly*, 134 Mass. 98. (3) (a) Upon, a deed for conveyance of property, describing and bounding the same by a street is a call for a street operating in the nature of a covenant by the grantor for, or operating in the nature of an estoppel of the grantor to deny the establishment and existence of, such street. *McKee v. St. Louis*, 17 Mo. 191; *Moses v. Dock Co.*, 84 Mo. 247; *Heitz v. St. Louis*, 110 Mo. 618; *Field v. Mark*, 125 Mo. 502; *Hatton v. St. Louis*, 264 Mo. 643; *Crowell v. Inhabitants of Beverly*, 134 Mass. 98; In the matter of *Lewis Street*, 2 Wend. 472; In the matter of *Twenty-ninth Street*, 1 Hill, 189. (b) And in connection with such deed, it is proper to consider a plat or survey of record relating to the property. *Buschmann v. St. Louis*, 121 Mo. 535; *Longworth v. Sedevic*, 165 Mo. 221; *City v. Barthel*, 256 Mo. 275. (c) And, as further related, are considered in connection with such deed and plat or survey the physical facts, e. g. fences and other structures, existing and adjacent continuations of the same street, as indicating the intention to establish a street. *Benton v. St. Louis*,

217 Mo. 701; *State v. Transue*, 131 Mo. App. 330. (d) The element of assessments for taxes and of omission from taxation is likewise, in the premises, considered to have a bearing upon the question of intention to create a street. *Moses v. Dock Co.*, 84 Mo. 247; *Hatton v. St. Louis*, 264 Mo. 644.

WALKER, J.—This is an appeal from a judgment of the Circuit Court of the City of St. Louis, appropriating certain property for street purposes.

A petition to establish, open and widen Glades Avenue, in the City of St. Louis, was filed by the city in the circuit court. Among other defendants named was the appellant. Commissioners were appointed, who awarded appellant nominal damages for her property taken and assessed her benefits at \$210.60. She had owned the property here involved many years. Prior thereto, it had belonged to her husband, now deceased, who, on the 3d day of September, 1886, had a survey made of it. This survey was filed in the office of the Recorder of Deeds of the City of St. Louis, on July 24, 1909. It designates the property as located "on Glades Avenue." The filing of this survey was subsequent to the making and delivery of a deed by appellant to one Chas. P. Heil, on July 13, 1909, "for a lot on Forest Avenue, extending along the south line of Glades Avenue." On July 12, 1915, the grantee, Heil, made a contract in writing with appellant, with reference to Glades Avenue, which, omitting superscription and the signatures of the parties, is as follows:

"This is to certify that I, Mrs. Emma Clegg, residing at Garner and Prather Avenue, in the City of St. Louis, agree to sell to Mr. Chas. P. Heil, residing at Garner and Forest Avenues, City of St. Louis, a strip of ground laying between his property on the southeast corner of Glades Avenue and Forest Avenue and for a depth of 200 feet eastwardly on said Glades Avenue. Said part or parcel of property five feet more or less that may be left between his property and said contem-

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plated forty-foot street, to be opened by the City of St. Louis as petitioned for by said Mr. Chas. P. Heil, Mrs. Emma Clegg and others, for a consideration of ten dollars per front foot on Forest Avenue and a depth of 200 ft. on Glades Avenue." Signed by both parties and witnessed.

A deed was also introduced in evidence dated January 29, 1917, from the appellant, to Walter W. Corey and wife, recorded May 28, 1917, which called for a lot of ground having a front of one hundred feet "on the south line of Glades Avenue, a private street fifty feet wide, by a depth southwardly of 174 feet and $7\frac{5}{8}$ inches to a private alley fifteen feet wide, the same being east of the property of Heil." This deed was made and filed for record after the commencement of this suit and the filing of the commissioner's report.

There was also offered in evidence a plat of a sewer district, which shows that the strip of land in controversy on the north line of the property of appellant, had been assessed for a sewer. A plat was also introduced in evidence showing an assessment district between Forest and Prather avenues, and an assessment for the paving of Forest Avenue against appellant, including one lot adjacent thereto, the property of Charles P. Heil, and also assessing against her one hundred feet further east to the end of the assessment district, and for the paving of the alley along the rear of said property.

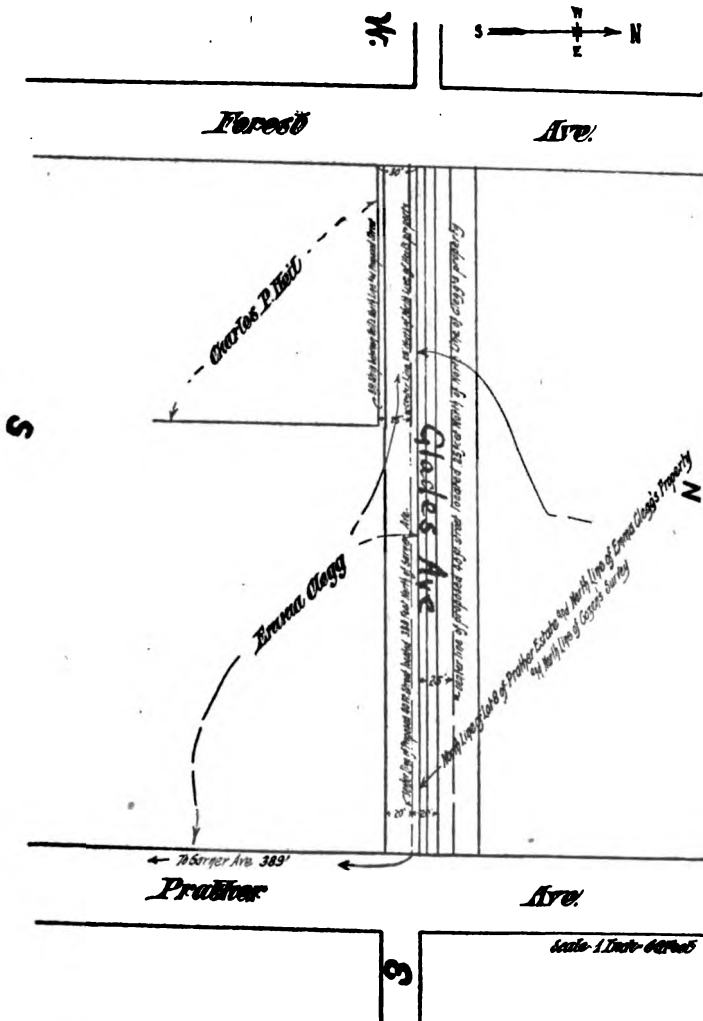
It was admitted that the Assessor of the City of St. Louis had assessed city and state taxes against appellant, including the property as described on the Cozen's survey and the property in controversy, during each year of her ownership down to the date of the judgment in this case, and that she had paid the taxes thereon. It was also shown that the assessor of special taxes had made out the assessment district for the sewer tax and that he had assessed appellant's property, because there was no deed to Heil, nor was the Cozen's

survey of record in 1908; that when he came to make the assessment for the paving of Forest Avenue he followed the Cozen's survey in assessing the cost of the paving of same against the appellant; that he made the assessment for the paving of that avenue against appellant's property by following the description found in the deed made by her to Heil, but made no assessment against the city for any part of Glades Avenue; that the assessment was made in such a way that the property north of Glades Avenue, as well as the property belonging to appellant south of this avenue absorbed the entire assessment of the area contained in the avenue. The plat accompanying this statement shows the location of Forest Avenue on the west and Prather Avenue on the east of Glades Avenue, the property of appellant and of Heil lying south of same. The particular area involved in this appeal is the southern part of the street defined by ordinance, designated as Glades Avenue, and extending from Prather to Forest Avenue, a distance of 530 feet.

I. The complaint of the appellant is on account of the alleged inadequacy of the commissioner's awards, in that they should have been substantial and not nominal in amount. The issue as thus presented requires for its determination the status of Glades Avenue, as a public or private highway. The appellant contends that no act of hers can be construed as a dedication. That the recorded plat of this property, while it may have indicated a proposed survey, bore upon its face no evidence that it was the act of the owners or that its recording had been authorized; that it possessed none of the requisites of a statutory dedication. [Coberly v. Butler, 63 Mo. App. 556; Downer v. St. Paul Railroad, 23 Minn. 271.] That a map or plat to constitute a dedication must be more than the drawing of lines along property designated as a street. [College v. Cedar Rapids, 95 N. W. 267.] That the passive permission of owners that the

**Appellant's
Contentions.**

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public may use lands, although continued for a term of years, does show an intent to dedicate to public use. [Postal v. Martin, 95 N. W. (Neb.) 8; Hartley v. Vermillion, 70 Pac. 273.] Thus the leaving of a lane through a farm to accommodate the owner and his neighbors is a revocable license, but not a dedication.

[Field v. Mark, 125 Mo. 502; Balmat v. City of Argenta, 184 S. W. 445.] Furthermore, that there was no acceptance on the part of the city, and that the strip of land at the time of the report of the commissioners was private property, and if so, that more than a nominal allowance should have been made for its taking. Specific reasons, based upon the testimony, are urged in support of these contentions, which will receive consideration later.

II. In the determination of the question as to whether there was a dedication of this property to a public use, the deeds from appellant to Heil and the Coreys merit more attention in the determination of

**Dedication
by Deed.**

the matter at issue, than has been given to them. Conceding the correctness of the rules above stated, as to the requisites of a dedication under appropriate facts, do the facts in evidence render these rules applicable in the instant case? In the deed to Heil, the property conveyed was described as follows: "A lot in block forty-six hundred twenty-four A, of the City of St. Louis, beginning at a point in the east line of Forest Avenue at its intersection with the south line of Glades Avenue, thence southwardly along said east line of Forest Avenue one hundred twenty-four feet seven and five-eighths inches, more or less, to the north line of property now or formerly owned by C. Moore, thence eastwardly along the north line of lot now or formerly owned by C. Moore, one hundred twenty-five feet, thence southwardly along the east line of lot now or formerly owned by C. Moore, and parallel with said east line of Forest Avenue, fifty feet, more or less, to a private alley fifteen feet wide, thence eastwardly on north line of said private alley seventy-five feet, thence northwardly and parallel with said east line of Forest Avenue one hundred seventy-four feet seven and five-eighths inches, more or less, to the south line of Glades Avenue, thence westwardly along said south line of Glades Avenue two hundred feet to the point of beginning."

In the deed to the Coreys made and executed after this suit was brought, we find the following description of the property conveyed: "A lot in block No. four thousand six hundred twenty-four A (4624A), having a front of one hundred feet (100') on the south line of Glades Avenue, a private street fifty feet (50') wide, by a depth southwardly of one hundred seventy-four feet (174') seven and five-eighth inches ($7\frac{5}{8}$ ") to a private alley fifteen feet (15') wide; bounded west by a line two hundred feet (200) east of and parallel to the east line of Forest Avenue. Also all right, title and interest in and to that part of the private street known as Glades Avenue which immediately adjoins the above described property on the north."

A dedication to the public in so many words is rendered difficult on account of the absence of a grantee. However, this has been obviated in some instances by construction. For example, a deed to "the present and future owners of town lots" is construed to be a dedication to the public (*Mayo v. Wood*, 50 Cal. 171), as is also a covenant in a grant which gave the citizens of a town "the free privilege of drinking water" from a spring on a tract of land adjacent to the town and owned by the grantors (*Corbin v. Dale*, 57 Mo. 297); likewise a deed "to the inhabitants" of a town has been held to be a dedication. [*Browne v. Bowdoinham*, 71 Me. 144.] Further than this to effectuate the purpose of the grantor at the time, as indicated by the language employed, it has been held that a dedication may be made in a deed from one individual to another if sufficiently explicit in terms to indicate the grantor's purpose. [*Barney v. Lincoln Park*, 203 Ill. 397; *Jersey City v. Morris Canal*, 12 N. J. Eq. 547; *Trerice v. Barteau*, 54 Wis. 99.] In such a case while the grantee acquires an easement by the grant, the deed at the same time constitutes an offer of the use declared. [*Fulton v. Dover*, 6 Del. Ch. 1, 6 Atl. 633.] An illustration of a dedication of this character is found in a case where a

party sells property within the limits of a city, and in the deed bounds the same by certain designated streets. The implication following this designation which is in the nature of a covenant, is that the purchaser and as a consequence, the public, is to have the use of such streets. [Moale v. Baltimore, 5 Md. l. c. 321, 61 Am. Dec. 276.] To hold otherwise, says in effect the Supreme Court of Pennsylvania, would enable the proprietor of a body of lands sold in lots to perpetrate a gross fraud. When he sells and conveys the lots according to a plan which shows them to be on the streets, he must be held to have stamped upon them the character of public streets. Not only can the purchasers of lots abutting on such streets thus assert their character, but all others. [In re Opening Pearl Street, 111 Pa. St. l. c. 572, 5 Atl. 430.]

While the Pennsylvania case seems to contravene the rule that an estoppel by deed, including an implied covenant, can operate only in favor of the grantee or his privies in estate (Kitzmiller v. Van Rensselaer, 10 Ohio St. 63; Sunderlin v. Struthers, 47 Pa. St. 411), and although an estoppel *in pais* can operate only when representations have been made to a legal person, who has relied upon them to the extent that it would be inequitable to allow them to be withdrawn (Stevens v. Ludlum, 46 Minn. 160, 24 Am. St. Rep. 210, 13 L. R. A. 270), there are numerous cases full of references to estoppel that seem to recognize that it can arise in favor of the general public, or that the general public can avail itself of an estoppel in favor of a legal person. [13 Cyc. 478, and notes.] Our own rulings affirm this doctrine. For example, in Moses v. St. Louis Dock Co., 84 Mo. l. c. 247, we held that the call for a street in a deed is more than a mere description, but is an implied covenant that there is such a street.

The rule announced in the Moses case has, under a like state of facts, never been questioned, but on the contrary has been frequently approved.

In the recent case of *St. Louis v. Barthel*, 256 Mo. 255, 166 S. W. 267, where commissioners in partition, as shown by their report and accompanying plats, reserved a strip of ground thirty feet wide for a street, and described the property abutting thereon, as allotted to the heirs, which did not include any part of said strip, and the report of said commissioners was confirmed by a judgment, not appealed from, and various lots were thereafter sold to parties who improved them in the belief that the street was a public street, the fact that the commissioners used the words "reserved for street purposes" instead of expressly stating that it was set aside for that purpose, did not deprive their act of the character of a dedication.

In *Hatton v. St. Louis*, 264 Mo. 634, where a plat was made by commissioners in partitioning land which bounded the respective allotments by certain streets and alleys designated as dedicated to the city, followed by an exchange of deeds between the allottees, in accordance therewith, though not acknowledged or recorded, it was held to constitute a common-law or non-statutory dedication, as efficacious as if legally accepted by the city in any recognized manner, or the owners had, by any act recognized by law, estopped themselves to question the dedication. [P. 644, citing cases.]

In *Heitz v. St. Louis*, 110 Mo. 618, we held that rights acquired under an incomplete or defective dedication by third parties will operate in favor of the public and such third parties so as to render the dedication valid, although lacking statutory requisites.

The deed from appellant to Heil, designates Glades Avenue as the northern boundary of the property and terminates the description of same by metes and bounds as "on the south line of said avenue." These references eliminated and the description would be insufficient to locate the property. It is evident, therefore, that in the mind of the grantor the designation of the avenue was intended as something more than the ar-

bitrary naming of a limit, but rather as a reference to a permanent line of demarcation which was to constitute, as stated, the boundary of the property conveyed. Designated as a street it must be held that the grantor intended it to be a street. Construed otherwise the words become meaningless and the effectiveness of the transfer fails on account of imperfect description.

A fact persuasive of the correctness of this conclusion is the survey of this property made for the husband of the appellant in 1886, and filed and recorded in the Recorder's office in the City of St. Louis, in 1909. It declares Glades Avenue to be the northern boundary of the property in controversy and designates it as a proposed highway. The presumption is not unreasonable that the plat of this survey was held at the time of its filing for record by the appellant and that its recording was at her instance. If so, its entry upon the record about ten days after the deed from appellant to Heil may, in the absence of any evidence to the contrary, be presumed to have been her act and as such declaratory of her purpose to dedicate that part designated as an avenue to the public for the use indicated by the term. In any event, it remained upon the record unchallenged at least seven years before this suit was brought. In addition, Charles P. Heil, to whom appellant made the deed to the property, testified as to user, in that Glades Avenue had been opened since 1902 and that he had several times driven through it.

In harmony with the cases cited, we hold that appellant's deed to Heil, aided by the facts stated, constituted a dedication to public use of that portion of her property, designated therein as Glades Avenue. The terms of the deed are unequivocal, it was accepted by the grantee, and the use of and dominion over the property has been regulated in accordance with those terms. A formal acceptance to render the dedication complete was, under such circumstances, unnecessary.

For example, we have held that a road opened by a landowner, with the consent of an executor of an estate owning the adjoining lands, which road is to be located on the landowner's land and that of the estate, constitutes, without more, a dedication. [Borchers v. Brewer, 271 Mo. 137.] To a like effect is the ruling that by deed, the owner of the ground may dedicate the same to the public for a street. [Duckworth v. City of Springfield, 194 Mo. App. 51, 184 S. W. 476.]

The writing between the appellant and Heil six years or, in fact at any other time after the dedication became complete, in which the former, for a consideration, agreed to sell the ground to the latter theretofore described in the deed, will not suffice to effect a revocation of the grant theretofore made, nor can it be construed in the face of the terms of the deed, as indicative of another purpose than that expressed in such deed. Besides, the grant, although made for the direct benefit of the grantee, and probably as an inducement to him to buy the land, was intended for the public and when this use was established, the right of revocation ceased.

The fact that at common law the fee in the soil over which a public highway is established, remains in the original owner, does not militate against this conclusion. While the fee may revert upon the vacation of the highway, until this occurs, the use of same by the public is absolute and can in no wise be affected by any act of the original owner. If it were otherwise, the grant would lose the characteristic of a dedication. The permanent use by the public is the matter of prime importance. [Second Street Imp. Co. v. K. C. Ry. Co., 255 Mo. 519; Worcester v. Georgia, 6 Pet. (U. S.) 515, 8 Law Ed. 483; Marsh v. Fairbury, 163 Ill. 401.]

Incidentally it may be said that if this had been a statutory dedication the fee would have vested in the city upon the recording of the deed. [Sec. 9287, R.

S. 1919; *Laddonia v. Day*, 265 Mo. 383.] The possibility of the ownership reverting adds nothing to the rights of the original owner so long as there is no vacation of the grant.

Eight years after the dedication of this property, and after this suit had been brought, the appellant, in a deed to Corey and wife, attempts to give color to the Heil deed not warranted by its terms and thereby change its nature by designating Glades Avenue as a private street. For the reasons stated in discussing the contract between the appellant and Heil, this attempt is ineffectual for the purpose intended.

Supplemental to the conclusion that it was the evident purpose of the appellant to dedicate the property comprised within the limits of Glades Avenue for public use, we come to the question of her right to damages. **Damages.** to damages as sought to be maintained in this proceeding. This demands the consideration of her legal status from another point of vantage. The effect of her deed to Heil was to divest her of title to the strip of land lying north of and adjacent to the property conveyed and constituting a part of Glades Avenue. Having parted with the fee in this property she was entitled to no damages for its appropriation. By her deed to the Coreys, she transferred her title to the continuation of this strip lying along the north of the boundary line of the property conveyed and constituting a part of Glades Avenue. Although designated as a private street in this transfer, so far as she is concerned the same rule applies as to her damages as in the case of a public street, as was held in *Restetsky v. Railroad*, 106 Mo. App. 1. c. 387.

Whatever damages she is entitled to, therefore, is for the appropriation of such portion of Glades Avenue lying north of and adjacent to the property she has not conveyed and comprising the remainder of the avenue between Forest and Prather Avenues.

Where the area included within a proposed public street is burdened in favor of adjacent lots with ease-

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ments in the nature of a street, public or private, the owner is entitled, upon condemnation for the formal establishment of a highway to recover only nominal damages. We so ruled in *McKee v. City of St. Louis*, 17 Mo. l. c. 191, in which we held that if a lot in a city is sold, bounded by a street designated as such on a map made by the owner of the lands, a reference to which sales are made, although the street remains unopened, under the authority of the corporation, the owner, when the street is subsequently opened on the application of the corporation, will be entitled only to nominal damages.

In *Bartlett v. Bangor*, 67 Me. 460, it is held that where land is taken for a public way, which is already burdened with a private way, the owner is entitled to no more than nominal damages.

In *Olean v. Steyner*, 135 N. Y. 341, the opening of a street as affecting the value of property adjacent thereto is discussed, and it is held that the advantage accruing are such as to entitle the owner to no more than nominal damages for the property appropriated.

In conformity with these rulings which, in our opinion, properly state the measure of damages, the judgment of the trial court is affirmed.

It is so ordered. All concur.

CHARLES MEFFERT v. MARTIN E. LAWSON, Executor of Last Will of JOSEPH F. MEFFERT, Appellant.

Division Two, July 19, 1921.

1. **NOTE: Implication of Payment.** It would be singular that a physician, actively engaged in the practice of medicine, making money in dealing in real estate, in which transactions he had continuous dealings with local banks, should not only borrow, but retain with-
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out any payments for almost ten years, considerable amounts of money from a brother, who, not shown to possess any unusual amount of property, combined the vocation of a barber with that of a druggist in a small town in another state; but these facts, though undisputed, are not substantial proof that the notes, if made, have been paid.

2. ———: **Indorsements: Other Necessary Proof: Limitations.** There is no presumption that the indorsement of a partial payment on a promissory note was made at the time it bears date; on the contrary, to remove the bar of limitations it is necessary to adduce other proof than the mere production of the note with a credit thereon bearing a date which would have that effect—proof showing that the credit was actually made by the owner of the note, or by his direction at a time when the note was not barred, or, by direct evidence, that the payment was actually made by the maker at such time.
3. ———: ———: ———: ———: **Similarity of Handwriting.** A judgment against a deceased maker's administrator on one note for \$2950 on which a credit of \$50 bearing date twenty days before the note would otherwise have been barred by limitations, and on another for \$500 on which a credit of ten dollars bearing date twenty-three days before the note would otherwise have been barred, cannot stand where the only proof, aside from the mere production of the notes themselves, that the payments were made when dated or at any other time, was opinion evidence that there was a similarity in the handwriting of the indorsements and that of the purported maker. If there is no evidence *aliunde* when a credit is indorsed, there must be proof that the payment was, in fact, made.
4. ———: **Alterations: Explanations: Presumption.** Where an alteration or erasure upon a note appears suspicious—for instance, where chemical and handwriting experts testify that erasures had been made on the face of the notes, indicated by the scratched and roughened condition of the paper; that the ink used at the point of erasure was different in composition and color from that used elsewhere on the notes, and that the effect of the erasures in one instance was to change the sum payable and in another to change the date—they demand explanation. Such changes are material alterations, and in their presence the law does not presume that they were made at or prior to the execution of the notes, but it demands that they be satisfactorily explained.
5. **EVIDENCE: Admission Made In Extremis.** Admission of a statement made by the purported maker of the notes sued on at a time when he was in *extremis* is error. And a statement that "I have

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fixed his notes, and he will get his money," with no evidence connecting it with the notes sued on and none identifying the person referred to, even if made in a lucid interval, is inadmissible and prejudicial.

Appeal from Jackson Circuit Court.—*Hon. O. A. Lucas*, Judge.

REVERSED AND REMANDED.

Lathrop, Morrow, Fox & Moore and George W. Day for appellants.

(1) The evidence should have been confined to the issues: (a) Were the notes altered in the respects asserted by defendant, and (b) did the indorsements upon the back of them, evidence an actual payment thereon? It was error, and highly prejudicial to defendant, to permit plaintiff to show that Dr. Meffert had stated that he owed his brother money on notes, without showing that he referred to the notes in question, and without limiting the effect of the evidence to the one question of alleged alteration. *Cox v. Mignery*, 126 Mo. App. 669; p. 1281, secs. 200, 201. (2) The alterations were what the law terms "suspicious," and it was incumbent upon plaintiff to explain them. It was also incumbent upon him to show that the indorsements on the two disputed notes, represented actual payments by the maker to the plaintiff, to be credited thereon. In neither of these respects did plaintiff discharge his obligation; therefore, the trial court erred in not sustaining the demurrers to the evidence as to these two notes, and in refusing to direct a verdict against them at the close of all the evidence. *R. S.* 1909, secs. 1888, 1909, 1911; *Clark v. Powell's Estate*, 208 S. W. 31; *Cox v. Mingery*, 126 Mo. App. 669; *Briscoe v. Huff*, 75 Mo. App. 288; *Elsea v. Pryor*, 87 Mo. App. 157; *Chapman v. Hogg*, 135 Mo. App. 654. (3) It is a partial payment, not the formal credit, that revives a debt barred by the statute, or tolls

the running thereof. *Clark v. Powell's Estate*, 208 S. W. 31; *Elsea v. Pryor*, 87 Mo. App. 157; *Chapman v. Hogg*, 135 Mo. App. 654. (4) If the maker or the holder of a promissory note, makes an indorsement of a payment thereon, when it is against his interest so to do, it will be presumed that a payment was actually made and that it was not done merely to save the instrument from the bar of the Statute of Limitations. On the other hand, if it appears from the indorsement that it benefited the party making it, there must be proof that a payment thereon was actually made, for the statute declares that "a payment of any principal or interest" revives the debt or tolls the running of the statute. Plaintiff's evidence tended to show that the indorsements were in the handwriting of the maker, Dr. Meffert. If they were, they were for his benefit, inasmuch as the notes were not then barred, and he was thereby reducing the amount of his obligation. No payment was shown. The notes were barred. *R. S. 1909, sec. 1911*; *Haver v. Schwyhart*, 39 Mo. App. 303; *Briscoe v. Huff*, 75 Mo. App. 288; *Crow v. Crow*, 124 Mo. App. 120; *Brown v. Carson*, 132 Mo. App. 371; *Smith v. Brinkley*, 151 Mo. App. 494; *Berryman v. Becker*, 173 Mo. App. 346; *Wester v. Wester's Estate*, 189 S. W. 608. (5) Ratification of unauthorized acts implies knowledge of such acts. If Dr. Meffert wrote the indorsements upon the disputed notes, after the alterations thereof, it should have been further shown, that he knew of the alterations. It was not so shown. *State v. Findley*, 101 Mo. 368; *Bremen Bank v. Umrath*, 42 Mo. App. 525; *Paul v. Leeper*, 98 Mo. App. 515.

Kelly, Buchholz, Kimbrell & O'Donnell for respondent.

(1) The trial court did not err in admitting evidence showing that deceased made statements concerning the notes in question against his interest and concerning the amount of the indebtedness to plaintiff ex-

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isting by virtue of said notes. (a) The testimony concerning the notes amounted to admissions against interest, and such admissions were competent in an action against the deceased's estate. *McLaughlin v. McLaughlin*, 16 Mo. 242. (b) The testimony as to the amount of the indebtedness was limited in its effect, by the court declaring to the jury that it was not admitted for the purpose of showing the execution of the notes or the indorsement, or for giving them vitality or effect, but simply for what it was worth with reference to the contention of the defendant that one of the notes was originally for twenty-nine dollars and fifty cents instead of for twenty-nine hundred dollars and fifty cents. These statements were admissions against interest which were competent against the estate of deceased on that issue. 1 Ency. Ev. 571-2. (c) In any event the defendant is estopped to complain of alleged error in the admission of said testimony for the reason that the said defendant introduced in evidence the statement of Mrs. Baker, a sister of deceased, and of Mrs. Meffert, the mother of deceased, concerning the notes and the indebtedness of the deceased to plaintiff, and hence if the admission was erroneous, defendant cannot now complain under the common error doctrine. *Thorpe v. Railway*, 89 Mo. 650; *Aronovitz v. Arky*, 219 S. W. 620; *White v. Railway*, 250 Mo. 476; 2 Ency. Pl. and Pr. 519; *Christian v. Ins. Co.*, 143 Mo. 460; *Reilly v. Railway*, 94 Mo. 611; *Holmes v. Braidwood*, 82 Mo. 616; *McGonigle v. Daugherty*, 71 Mo. 259; *Smith v. Culligan*, 74 Mo. 388; *Davis v. Brown*, 67 Mo. 315. (2) The court did not err in refusing to give the peremptory instructions requested by the defendant. (a) When defendant admitted that the deceased executed the notes, the law presumed that the alleged alterations were made at or prior to the time of the execution of the notes, in the absence of a preliminary finding by the trial court that the alleged alterations were suspicious. *Matthews v. Coulter*, 9 Mo. 411; 1 Greenleaf, Evidence, 564; *Lubering v. Kohlbrech-*

er, 22 Mo. 596. (b) The statute required the court to presume, in the absence of evidence to the contrary, that the payments were made at the time they were indorsed and thus changed the rule announced in the decisions cited by appellant. R. S. 1919, sec. 798. (c) When plaintiff introduced evidence showing that the payments were indorsed on the back of the notes by the deceased, and when it was conceded by the appearance of the undisputed \$200 note, and by the witnesses put on the stand by the defendant that the deceased was slovenly and careless in writing his notes, and occasionally wrote some of them standing on his head, the trial court had no choice in the matter, but was bound to submit the case to the jury, either by a peremptory instruction to find for the plaintiff or by the instructions by which it was submitted. *Goddard v. Williamson's Adms.*, 72 Mo. 131; *Gardner v. Earley*, 78 Mo. App. 346; *Rega v. Williams*, 185 Mo. 631; *Phillips v. Mahan*, 52 Mo. 197; *Ray v. McConnell*, 179 Mo. App. 400; *Smith v. Brinkley*, 151 Mo. App. 494. (d) Anna Meffert, the daughter of deceased, and residuary legatee under the will, and hence the real defendant in the case, notwithstanding she was called as a witness on the part of the defendant, did not testify or deny that the alleged alterations and the indorsements of payments were in the handwriting of her deceased father, and for this reason alone the finding against defendant's contention was proper. *Keime v. Railway*, 254 Mo. 194; 1 *Starkey on Ev.* p. 54; *Moore on Facts*, pp. 571, 574, 575; *McClanahan v. Railway*, 147 Mo. App. 386; *Cass Co. v. Green*, 66 Mo. 512; *Payne v. Railway*, 136 Mo. 594; *Schooler v. Schooler*, 258 Mo. 83. (e) The statute (Sec. 5438, R. S. 1919) authorizes the admission in evidence of any writing proved to the satisfaction of the judge to be genuine and authorizes comparison of such writings with that in dispute by witnesses, and authorizes that such writings and the evidence of witnesses respecting same may be submitted to "the court and jury as evidence of the genuineness or otherwise of

the writing in dispute." Several of the writings admitted to be genuine and which the trial court and jury examined are not included in this record by photographic copy or otherwise. The omitted writings were admitted to be genuine. Their comparison with the disputed writing by the jury would have been sufficient alone to sustain a verdict even in a criminal case. *State v. Scott*, 45 Mo. 302. (3) The complaint against the instructions is that they authorized the jury to find that the bar of the Statute of Limitations applied to the notes, and that it was removed by a mere indorsement of a credit without an actual payment; but the instructions did not authorize the jury to find that if the deceased had merely made an indorsement of a fictitious payment on the notes they must find for the plaintiff, but the said instructions required the jury to find that the credits were indorsed not as fictitious but as payments, and it so prohibited the jury from finding for the plaintiff on each of the notes if they found an alteration of the notes in amount or date without the knowledge of deceased "after the date of said payment, if any." These instructions categorically referred to a payment in fact and not in a fictitious payment. (4) But defendant's instructions numbered 4 and 5 proceeded upon the theory that if the credits were not in the handwriting of the deceased, the finding should be for the defendant and impliedly authorized a finding for plaintiff if the deceased had merely indorsed the credits. That is to say, the trial theory of the defendant was based upon a concession of the fact that there was an actual payment if the deceased had indorsed the credits. Defendant will not now be permitted to change his trial theory. *Mitchell v. Railways*, 125 Mo. App. 11; *Drug Co. v. Bybee*, 179 Mo. 354; *McDonnell v. Bldg. Assn.*, 175 Mo. 250; *Black v. Ry.*, 172 Mo. 177; *B. & L. Assn. v. Obert*, 169 Mo. 507; *Heman v. Larkin*, 108 Mo. App. 393; *Coal Cb. v. Watson*, 107 Mo. App. 451; *Strother v. Dewitt*, 98 Mo. App. 293.

WALKER, J.—The plaintiff filed a petition in the Probate Court of Jackson County, for the allowance of a claim against the estate of Joseph F. Meffert, based on three promissory notes alleged to have been made by the latter to the plaintiff. A verdict was rendered by a jury in favor of the plaintiff, from which an appeal was perfected to the circuit court. Upon a trial in that court a judgment was rendered May 2, 1919, in favor of plaintiff, from which the defendant appeals.

The petition on which this action is based is in three counts: The first is on a note made to plaintiff by Joseph F. Meffert, on November 14, 1901, for \$2950 with the following indorsement on the back of same: "By cash, October 24, 1911, on within note \$50." The second is on a note made to plaintiff by Joseph F. Meffert, November 14, 1902, for \$500, with the following indorsement on the back of same: "By cash, October 21, 1912, on within note \$10." The third is on a note made to plaintiff by Joseph F. Meffert, June 8, 1913, for \$200. The last mentioned note is conceded to be valid and is not contested.

Thos. A. Hardwicke, a barber, testified for the plaintiff as to his familiarity with the handwriting of the deceased; that he had known the latter for about twenty years and had frequently seen him write; that he was careless in his writing; that he had none of his writing at the time, but had formerly had one or two prescriptions given him by the deceased, who was a doctor, and that he got one of these from a drug store where he had left it and it was exhibited to the jury; that this prescription was in the handwriting of the deceased; witness then identified the indorsements on the back of the notes as being in the same handwriting.

William Meffert, a brother of the plaintiff and of the deceased, testified to his familiarity with the handwriting of the latter; that the notes sued on and the indorsements thereon, were, in his opinion in the handwriting of the deceased. In response to an inquiry as to

whether he had had a discussion with the deceased a few hours before his death, concerning amounts owing on notes signed by the deceased, he replied that the deceased said: "I have fixed his notes and he will get his money." That this was practically all he said in connection with that matter. Further, that the "hundred and twenty-nine" on one of the notes was in Dr. Joseph Meffert's handwriting.

On cross-examination this witness stated that except casually on two or three occasions he had not seen the deceased for about twenty-five years; that when the daughter of the deceased sent the witness word that her father was dying, a day or two before his death, he at first refused to go to see him, but finally went; that the deceased was not conscious when the witness first saw him, but that he brought him to consciousness. Continuing, the witness said: "I say he was conscious and I brought him there purposely. He was unconscious, he was under the influence of hyocene, catcine and morphine and they had been doping him with one shot right after another until I arrived when I changed that formula. I never saw him for probably two hours after I got there, until he became conscious and then they asked for me to be admitted. I treated him, after I arrived, to restore consciousness. He was really muddled from hyocene, what we call a mild delirium, due to the action of the drug; he was not normal when I got there. In two hours after, he knew people. He was still partially conscious, practically you might say, in a sub-conscious state, under the influence of a drug. I simply withdrew that, that was early in the evening, after my arrival about ten o'clock as I remember, I saw him about midnight, or possibly earlier, I cannot say the exact hour. I stopped the administration of the drug, he talked to me in the morning about eight o'clock, and died about five that evening. I was with him that morning about three-quarters of an hour; I saw him again, I was right with him when he died. He was not conscious all the time.

He became conscious in the afternoon, about two or three o'clock, maybe four. The coma deepened until he became absolutely unconscious.

"There is no scratching or erasure on the \$500 note that I can see. The handwriting on the back is Dr. Meffert's handwriting—the indorsement. So far as my judgment is concerned, I would say absolutely so. My reason, is familiarity with his handwriting; that I haven't seen it would make no difference. You get an impression of this case, don't you? You know that as well as I do and to show you a similiarity in that letter, this front part of the letter is one of the letters I refer to. This is one of the letters I found at home among other letters and I picked that up to compare this with your notes at the other trial; that is the reason I had this letter in my possession." There were two letters. Another letter was exhibited in regard to which the witness says: "That is also my brother's handwriting, that was written long years ago, probably twenty or twenty-five years ago." Then follows a long statement by the witness wholly irrelevant as to the nature of his personal relations with the deceased. On re-direct examination the witness said: "That note handed to me appears to have scratches on it, also this one, is certainly with those that are scratched. The word 'May' is written under the word 'June' in pencil on the \$200 note. I cannot make that out, there is some writing there under "2," the word June has been written over that. It appears there under the words 'Chas. Meffert.' There has been some writing there that has been scratched out and in the \$200 note. I did not visit with my brother, the Doctor, Joseph Meffert, in my mother's home when I went to Emporia; we never met there." On further cross-examination, the witness said: "I asked him (decd) in regard to Charley's note; he remarked, 'These notes were all right and would be paid.' That was the substance of what I testified to in the other trial."

Thos. A. Hardwicke, recalled for further cross-examination, said: "I never looked for any more prescriptions or receipts, my business is that of a barber; I have nothing to do with handwriting, only just our laundry and writing laundry names, different names. I am no expert; I saw the Doctor's handwriting on these prescriptions, which I turned into the druggist and I had two receipts, and that is all the familiarity I had with his handwriting."

The wife of the witness Hardwicke, testifying for plaintiff, said: "I knew Dr. Joseph F. Meffert in his lifetime, twelve or fourteen years; I knew his brother Charley (the plaintiff) and Charley's wife; I heard some talk of a trade between Dr. Joseph Meffert and his brother Charley, for real estate in Kansas City. I took two or three trips with my sister-in-law to look at places. After we had looked at two or three places, the Doctor said, 'Well, if you want the property I will see that you get it. I owe Charley between thirty-six and thirty-seven hundred dollars on these notes and the trade will more than pay for the property.' I know the handwriting of Dr. Joseph Meffert, the \$3674 note dated July 26, 1915, payable to Mary Meffert is in Doctor Meffert's handwriting and so is the note of September 6, 1915, \$2000, payable to Mary Meffert, and the \$2950 note of November 14, 1901, payable to Chas. Meffert. In my judgment the words 'twenty-nine hundred' are in Dr. Meffert's handwriting, and so is the indorsement. On the \$500 note, 1902, the words 'by cash, October 21, 1912 on within note \$10' in my opinion, Doctor Meffert wrote those words. In my opinion Dr. Meffert wrote the figures '2-15,' and signed his name on the receipt for \$10, December 4, 1915, reading: 'Received from PIPPS Taylor, rent 3602 East 15th, till December 1, 1915, Joseph F. Meffert.' I am the wife of Mr. Hardwicke; my husband's sister is Charley Meffert's (the plaintiff's) wife. I have talked with Dr. Meffert; he said he owed Charley some money and would pay it; he said he owed between thirty-six and thirty-

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seven hundred dollars, with interest. If they did not get the amount I stated in my testimony at the former trial, that is not my fault. I remember it, because the Doctor said it at my house." Cross-examined as to the appearance of the faces of the notes, the witness found no evidence of any erasure or other indications of a change in the note since it was originally written. Witness has had no experience in the matter of handwriting, or the comparison of same.

A Mrs. Baker testified: "I am the sister of Dr. Joseph and of Charley and William Meffert; I have lived in Liberty practically all my life. I have seen my brother, Dr. Joseph Meffert, sign different papers; I think I know his handwriting. My opinion is that the \$2,000 note, payable to the order of Mary Meffert, is in his handwriting. In the last five or six years before his death, I saw him do writing very little. He did not do any writing at our home at all. Only if he wanted a little change from ma, he would make a little note and sign it to her. That is all the writing he ever done—he never gave me a line; I never had any business transactions with him; the only ones I ever saw were some he gave my mother." Disclaiming any knowledge of the handwriting of the deceased, other than as indicated, the witness said: "As far as his name to the notes are concerned, I think he wrote his name. That looks, to my opinion, like his writing in the body of the note, the words 'twenty-nine hundred,' and the figure '2.' Of course, that may be his writing or may not; of course, I can't tell. I didn't see him do it. I don't know whether it is or not. I signed the paper at Mr. Lawson's office, saying I knew nothing about this case. He did not show me the notes. I told him I didn't know anything about the notes. I told him I had not seen the notes. I have not seen enough of the Doctor's handwriting to be able to tell about his signature." She could not remember to have heard the Doctor say anything about my indebtedness to his brother Charley.

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"I never spoke to him about his business at all. Of course; I know that you know that he owed Charley some money. I can't just remember, it was probably eighteen or nineteen years ago, it was a long time ago since I heard from any source he owed Charley." This was all the evidence for the plaintiff.

The testimony for the defendant, was as follows:

John S. Major, president of the First National Bank of Liberty, testified as follows: "I am in the banking business; I have been for twenty-two years. I was acquainted with Dr. Joseph Meffert in his life time. He was a customer of our bank when I came there in 1897; he had been before, but I don't know how long. He carried an account there up until the time of his death, and I had checks often. I became familiar with his handwriting. It is a part of my business to familiarize myself with handwriting, as an active official of the bank. The indorsements on the back of the two notes, the one for \$500, and the other for \$2950 are, in my opinion, not in the handwriting of Dr. Meffert. Looking at the word 'hundred,' on the note for \$2950, it appears that there has been a line drawn thereon and extended out to the word 'dollars' and the line erased and the word 'Hundred' written over it. There is a character joining the top of the two strokes, forming the letter 'H,' in the word 'Hundred,' that is the same character as the '&' out at the end of it. Also at the end the '100' under the line is printed and the '50' is written over, as '50/100.' If the line was drawn from the 'twenty-nine' it would read 'twenty-nine: fifty.'

"In the \$500 note, the '2' figure in 1902, shows to have been written over an erasure. You cannot make out distinctly what is under there; it looks like it might be a '1,' but I am not sure about that, but the '2' has evidently been written over the other, with a different colored ink. One has turned brown and the other, the '2,' in black ink, has not turned brown. The date seems to me to originally have been 1901. There is a payment

'by cash, October 21, 1912, on the note for \$10.' I am familiar with Doctor Joseph's signature. That is his signature on this note. Doctor Meffert was a careless man in his way of writing." Having read the face of the \$200 note, conceded to be genuine, the witness stated: "This reads 'Two Hundred' with dollars and then interest; very carelessly and loosely drawn. It is plain that the word 'May' was erased and June written over it on this note, and that the handwriting is that of Dr. Meffert, and the 'Two Hundred' is written over the erased word "received," at least, that is what the face of the note indicates. There seems to have been an erasure where the name of 'Charles Meffert' now appears in the note." The witness is here examined at length about the distinguishing differences between the similarity and dissimilarity in the figures appearing on the different notes, as indicative of the amounts of same.

John L. Dougherty, cashier of the Commercial Bank, at Liberty, having occupied that position for fifteen years, testified as follows: "In connection with my business, I have had occasion to give attention to the matter of handwriting and the signatures of people and the identification of their writing. We have to know our customers signatures; naturally we pick up information about handwriting. My position has required me to do that kind of work. I knew Dr. Joseph Meffert all my life, nearly; he did most of his banking business while I was with the Commercial Bank, at the First National, but he did some business with us. I had occasion to see his checks and also to pass on them. At times he had an account in our bank. I am familiar with his handwriting." Shown the two notes, one for \$2950 and the other for \$500, the witness stated: "that the indorsements on the back of same were not in the handwriting of Dr. Meffert; the signatures seem to be in his writing. On the note for \$2950, it looks like the 'Hundred' had been scratched out between twenty-nine and 50/100 dollars, and the space written over. The top stems of the 'H'

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seem to have been changed. The 'Hundred' and 'Twenty-nine' is heavier, as would be natural when written over an erasure. It looks very much as though there had been a line drawn there, running from the 'Twenty-nine' to the cents, 50/100, and the 'H' looks like it had been made with two strokes and then afterwards another added. At first glance, if it was by itself, you would not know whether it was intended for an 'H' or not. On the \$500 note, it looks to me like the '2' had been erased and written over with a different colored ink." On cross examination, witness stated: "that if he was called on to pay a check for 'Two Thousand, Nine Hundred Fifty' he would not pay it, because there is nothing there to indicate that it is dollars. There is nothing to indicate that there is dollars, except the dollar mark in front of it and that is imperfect. It is not '\$29.50' in figures and it ain't '\$2950.' There is no symbol or anything to indicate to me what it was. It looks to me like the figures '\$2950' are Joseph Meffert's, but I couldn't tell without a good many more of them to compare with it, than I have. I would not say that those figures following the dollar mark '2950' were written by Joseph Meffert, for \$2950. This note which you show me as having been made 'o his mother looks like the Doctor's handwriting. I would swear to it as well as I can swear to anything. The word 'Hundred' in the \$200 note is written over an erasure. The signature to that note is in his writing. It looks as though the \$200 note had been written on some kind of a blank receipt. The Doctor was a slovenly man in making his checks and notes, at times. I knew Dr. Joseph Meffert all my life and I don't know whether he ever drank or not. I think the Doctor wrote the note which you have shown me, to his mother, and also the \$200 note. I think he wrote the word 'Hundred' in the \$500 note. I don't recall that he ever borrowed money from our bank."

James H. Southwell, director of a Microscopical Pharmacy in Kansas City, testified: "That he had about thirty years experience in this line of work." Shown

\$500 note, he stated: "That this note is written in the common ink used, called fluid or as chemists called it, iron nutgall ink, except the figure '2' which is written in common black or logwood ink. I tested this note in different places, first the figures, then the signature, and found that the '9' and '0' were written in iron nutgall ink, common writing fluid, such as Carter's, Sanford's or Arnold's, while the '2' is written in logwood potassium ink, or common black ink. These are the two kinds most commonly used for business purposes. The body of the note and all of the date except the '2' is in one kind, and the '2' is in another kind." This is followed by a long statement of the witness as to the constituent elements of the different kinds of ink and the test used in determining their nature. Continuing, the witness said: "I put the \$2950 note through these tests. I found that it was entirely written in one kind of ink and examined the word 'Hundred' microscopically, and found a line of erasure that ran from a little this side of the '&' to nearly the end of the 'u' upon the paper. This examination disclosed that the paper fiber was disturbed and that it ran over to the '50/100.' " The witness demonstrated the manner in which the erasure was disclosed, by illuminating the same under an electric light. Following this exhibition, the witness said: "Well, you can see at the end of the 'd' there, that the erasure or disturbing of the paper runs up to the 'd' and beyond. The paper is scored or picked into a little bit where the erasure was made. By moving the paper along here, you can see, it shows plainly. The erasure I find is discernible up to the first part of the 'u', and from there on clear on before the small 'r' in the word 'Hundred.' I have had a great deal of experience in the matter of examining handwriting in one way or another. I have made a study of this subject. I think these indorsements were written by the same person. It seems as though they were done by a writer, more or less expert than the person who did the writing on the face of the

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notes. I discover no common characteristics between the writing on the faces of the notes and the two indorsements, but the latter have the same characteristics." Further dissimilarities between the writing on the faces of the notes and the indorsements were brought out on cross-examination, as well as points of difference not necessary to be detailed here.

Anna Meffert, daughter of the deceased, testified as follows: "I was present at the time of my father's death, in 1916. I was not living with him at the time, but was with him from Sunday until after he died on Wednesday. There was in his house when I went there and until his death; the housekeeper, and Mrs. Charles Meffert was out there part of the time; a nurse was with him all the time. When I saw my father on Sunday, before his death, he was very low and seemed to recognize me a little; he kind a smiled, but was not able to talk. I don't remember of his saying anything to me. I walked up to him and took hold of his hand and he just pressed mine and I could tell from the way he was acting that he knew who I was. He seemed to be in rather a dazed condition, and he was lying with his eyes closed; he was conscious on Monday and a little conscious on Tuesday, but after Tuesday evening he did not seem to know anything. On Tuesday night I went out to Mrs. Baker's and stayed all night. Wednesday morning, as soon as I could come back, I went to his sick room and was there until he died. I may have gone out to lunch, I don't remember; I may have gone into the dining room now and then and came back after lunch and came back and sat there before he died and when the nurse came into the kitchen and told us he was dying. During the last day, Wednesday, he did not converse with anyone; he was not conscious; I was present along from early in the morning until when I just stepped out. If my uncle, Dr. William Meffert, from Emporia, had any conversation with him that morning about notes, I did not see him and did not hear him. He was

there on Wednesday afternoon and I think it was then he went in there; I was there sitting in the room and he wanted father to take some nourishment; he was lying at the time in a semi-conscious condition—I don't know whether it was a stupor or not. He did not open his eyes or say anything. They put something into his mouth, and Dr. William Meffert took his face and patted it and said, 'Swallow, swallow, swallow.' That was all, there was no response on my father's part." Cross-examined, she said her father was about 59 years of age, and that he left her the greater part of his property in his will. Portions of the will were then read over to the witness. "I cannot say what the relationship was, or had been between my father and his brother William as manifested when the latter came to my father's bedside, because he was unconscious. I cannot say that it was friendly; I am sure that he was unconscious from Tuesday evening on. I was in the room off and on."

C. W. Ransom, author of a system of penmanship in different forms, for thirty years, testified: "I have written text-books on the subject, and have had occasion to examine handwriting and disputed documents for the purpose of ascertaining the genuineness of the writing. I have made a study of that matter. I have examined these two notes, one for 'twenty-nine hundred dollars' in writing and '\$2950' in figures, and one for '\$500' in figures, and I have had an opportunity to examine these writings you hand me and which are marked as exhibits in this case. In my opinion, the indorsement on the back of the note for \$500, to-wit, 'By cash, October 12, 1912, on within note \$10', is not in the handwriting of the party who wrote the face of the note, excluding the date there or the '2' in said date. The indorsement on the note for \$2950 is, in my opinion, not in the handwriting of the party who wrote the face and body of that note and the signature." Witness then explains his reasons for that conclusion, based upon the manner in which the writing

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was done and the formation of the letters. Taking the \$500 note, the witness stated: "that it was very evident that underneath the '2' in the date 1902, there had been an erasure." The reasons for this conclusion are also given, not necessary to be detailed. Continuing, the witness said: "It looks very much like the 'twenty-nine' in this note for \$2950 was written, but the '&' was made and then a straight line extended to the '50' and then this line was erased. This erasure seems to have been made clear across and right over the top of the 'Hundred' and the loop or the top of the uprights of the 'H' are the remnants of the old '&.'" Cross-examined, the witness said: "I understand that all the signatures are admitted to be genuine on these different notes. I think I could pretty definitely determine whether the handwriting was that of Joseph Meffert." The witness then proceeds to define the distinguishing characteristics between the different writings on these notes. The conclusion being that the changes made were not in the handwriting of Dr. Joseph Meffert, or more correctly perhaps, that the signatures and the other writings on the notes were not by the same person who made the erasures and the changes. On re-direct examination, the witness stated "that the \$200 note was apparently written on a piece of paper that had theretofore been used for something else and was dated 'May 1st' with an indelible pencil." What are called the characteristics of handwriting were explained, and while they were stated to vary in some degree, according to the position of the writer and the conditions under which they were written, the characteristics would be the same.

Martin E. Lawson, testifying on behalf of the defendant, said: "I live in Liberty; I am the administrator of Dr. Meffert's will. I had known him about twenty-five or twenty-six years before his death, and had acted as his attorney for twenty-one or twenty-two years. He was in my office on an average of once a month during that time. Frequently he was there twice a week, often-

times I would have him sign deeds, contracts or papers, and he would sit down and make some rough sketch of agreement he was about to make with someone, for me to put in legal form. I have seen him write a great many times and have had his handwriting before me frequently. I had seen the note dated June 8, 1913, payable to Charles Meffert, for \$200, before the Doctor's death. My recollection is I saw it before it was delivered to Charles Meffert. I first saw these two notes, one, Twenty-Nine Hundred Dollars, in writing, \$29.50, and the \$500 note, the two that are in controversy in this case, shortly before the Doctor's death. Sometime after his death, Charley Meffert and his wife brought the notes to my office. I then saw the indorsements or credits on the backs. From my experience and acquaintanceship with the Doctor's handwriting and having seen him write, I am of the opinion that these indorsements were not written by him. I formed that opinion when I first saw the notes and took them to his banker, Mr. Major, that same day. At the time this suit was instituted and after these notes were brought to me and my suspicions were aroused about them, I took a statement to Mrs. Baker and Mrs. Meffert, the mother and sister, and asked what they knew about it. I took their statements in writing, Mrs. Baker signed it and Mrs. Meffert, who was blind, made her mark."

Cross-examined, the witness said: "I do not attempt to account for the slovenly or careless way in which the \$200 note is written. The Doctor had a way of picking up most any sort of paper and writing on it. I notice this note is written on a receipt blank. I don't know anything about his writing, rubbing out and writing over it. He was careless in the formation of letters; he did not form his letters fully and completely at all times. I never saw him rub out and write over anything. This note looks like he started, or somebody started, to write the word 'Received' here and this had been rubbed out and the note written over the top of it. It is written on a loose piece of paper." The witness then explains the conditions

under which the \$200 note, conceded to be genuine, was made by the deceased to his brother, the plaintiff.

This was all of the evidence.

The setting forth at length of the relevant testimony of the witnesses for the respective parties is not deemed inappropriate to assist in determining the greater credence which should be given to their testimony if, in its examination, the rule is kept in mind as to the province of the jury where there is substantial evidence to sustain any issue. In no other way than by a presentation of the testimony of witnesses in their own words can the same be weighed and measured so as to satisfactorily determine its probative force. In the application of this test, the intelligence, experience and familiarity with the matter in controversy and the interest or lack of interest of the witnesses in the result of the action, may be fairly taken into consideration.

The payment of the notes in controversy is contested: (1) on the ground that they have been paid; (2) that they are barred by the Statute of Limitations; (3) that they are void because of material alterations; and (4) that the credits on the backs of same are not in the handwriting of the alleged maker.

I. Other than by implication, there is nothing to sustain the contention that the notes have been paid. The facts, not disputed, are that Joseph F. Meffert, in addition to being actively engaged in the practise of medicine, made money in dealing in real estate, in which transactions he had continuous dealings with local banks. These facts lend persuasive coloring to the conclusion that while thus engaged, it would be rather singular that he should not only borrow, but retain without any payments thereon, for almost ten years, the amounts of these notes, from a brother not shown to have been possessed of any considerable means, who combined the modest vocations of a barber with that of a druggist in a small town in Kansas. In the face of these facts, the

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impartial mind which draws its conclusion from the known and well recognized conduct of men under like circumstances might reasonably hesitate to give ready credence to the creation of these debts. If created, however, no substantial proof has been adduced as to their having been paid.

II. A more serious question confronts us in the contention as to the bar of the Statute of Limitations. On the back of the note for \$2950, there appears a credit or the indorsement of a payment for \$50; dated October

Limitations: 24, 1911, which was twenty days before the
Indorsements. note would have been barred by the statute.

On the back of the note for \$500 there appears a credit or the indorsement of a payment of \$10, dated October 21, 1912, or twenty-three days before this note would have been barred by the statute. Waiving the rather unusual circumstances that these notes were made by a business man, who, judging from his pecuniary successes or superior acquisitive ability, must have realized the importance and be reasonably held to have pursued the course of promptly meeting his obligations, it is rather unusual, to say the least, that he would borrow these small amounts from a brother, who is not shown to have had any money, and thereafter completely ignore the obligations thus incurred, for almost the entire legal life of the debts and then make these nominal payments in the manner in which their entry upon the backs of the notes indicate that they were made.

However, the absence of proof as to these payments having been made other than their entry on the backs of the notes is the matter with which we are primarily concerned. Aside from the opinions of certain of the witnesses for the plaintiff, shown to have been non-experts, that the handwriting of these entries of payments was the same as that of the signatures of the payer or the alleged maker of the notes, there was no evidence offered on this subject.

It is the well settled law of the State that there is no presumption that an indorsement of a payment on a promissory note was made at the time it bears date, and to remove the bar of the Statute of Limitations it is necessary to adduce in evidence other proof than the mere production of the note with a credit thereon, bearing a date which would have that effect. A contrary rule was announced in *Carter v. Carter*, 44 Mo. 195, and in *Smith v. Ferry*, 69 Mo. 142, to the effect that in indorsements of payments on promissory notes, it is presumed that they were made at the time they bear date; but these rulings, as shown by later cases, do not correctly declare the law, in that it is now held to be necessary, in order to remove the bar of the statute, to show that the credit was actually made by the owner of the note, or by his direction at a time when the note was not barred by the statute, or, by more direct evidence, that the payment was actually made by the maker at such time. If it be shown that the credit was indorsed on the note by the holder at a time when the same was not barred and was, consequently, against his interests to have made it, this will furnish prima-facie proof that payment was made at that time and in the absence of a showing to the contrary the note will not be barred, but in such cases there must be proof that the credit was, in fact, made at such time. There was no such showing. Aside from mere opinion evidence as to a similarity in handwriting, which was subjected to serious question by strong counter proof, no effort was made by the plaintiff to support the claim that these payments were made when dated or at any other time. If the rule regulating this matter were otherwise, ample opportunity would be afforded for fraud, in that the holder of a note would have it in his power to toll the running of the statute by simple dating a payment prior to the bar, especially where, as in the instant case, death had closed the mouth of the maker. The countenancing of payments so entered without proof, would result in destroying the rule heretofore recognized, that

payments antedating the bar of the statute are held to be against the holder's interest, in that an antedated entry of payment would redound to his interest. Hence, the wisdom of the requirement that there must be proof *aliunde* of such payments.

In Phillips v. Mahan, 52 Mo. 197, it is held that an indorsement of partial payment made on a note by the holder without the privity of the maker is not of itself sufficient evidence of a payment to repel a defense created by the Statute of Limitations.

In Goddard v. Williamson's Admr., 72 Mo. 131, it is held that when the Statute of Limitations is relied on as a defense to a note, the plaintiff should not be permitted to read in evidence credits indorsed on the note without first proving when the indorsements were made.

In Regan v. Williams, 185 Mo. l. c. 631, it is held that it is not the indorsement of a credit, but the payment that operates as a renewal of a promise and removes the bar of the Statute of Limitations; that the party relying on a payment to stop the statute must not only establish that it was made, but that it was made by the authority of the defendant; that a part payment does not take a debt out of the statute unless made under such circumstances as to warrant the inference that the debtor thereby recognized the debt and signified his willingness to pay it.

In Zaring v. Bauman, 223 S. W. (Mo. App.) 947, in which the facts disclosed that the holder of a note had indorsed payment thereon before the note was due, it is held that the mere indorsement of a credit on a note does not prove that such credit was entered before the note was barred, but there must be evidence *aliunde* of the indorsement of such payment to show that it was in fact indorsed as a credit before the note was barred.

In Berryman v. Becker, 173 Mo. App. 346, it is held that where there is proof that a credit was indorsed on a note by a holder at a time when it was not barred, this being against his interest, is *prima-facie* evidence

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that payment was made at that time, and, in the absence of any showing to the contrary, the note will not be barred, but where there is no evidence *aliunde* as to when the credit was indorsed, there must be proof that the payment was, in fact, made.

III. The testimony of chemical and handwriting experts was to the effect that erasures had been made on the faces of the notes; that same was indicated by the scratched or roughened condition of the paper and that the ink used at the points of erasure was different in composition and color from that used elsewhere on the notes.

Alterations. The ancient rule of evidence, as stated and discussed by Mr. Greenleaf (1 Gr. Ev., sec. 564), was that alterations and erasures of written instruments were presumed to have been made at or prior to the time of their execution. The trend of authority is still in favor of the rule as thus declared. However, where an alteration or erasure appears suspicious on its face; for example, where a different ink has been employed at the point of erasure from that elsewhere used in the instrument, it demands explanation. In the presence of this, or equally cogent circumstances of a suspicious nature, the law presumes nothing and the question as to the time when, the person by whom, or the interest for which, the alteration was made, are matters of fact to be found by the jury upon proof adduced by the party offering the instrument in evidence.

Commissioner RAILEY, in *Collison v. Norman*, 191 S. W. 60, with commendable care, has recently discussed the question here under consideration and has reached the conclusion above indicated, supported by a wealth of authority from our own and other courts. The erasures here testified to by experts as having been made, were, in one instance, such as to change the sum payable; in the other, to change the date. Such changes are classified by our statute as material alterations. [Sec. 911, R. S. 1919.] As such, they should have been explained.

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[Mech. Am. Nat. Bank v. Helmbacher, 201 S. W. (Mo. App.) 383.]

We have heretofore discussed the question as to whether or not there was any evidence that the indorsement of the payments on the notes was in the handwriting of the deceased.

IV. Error was committed in the admission in evidence, without more, of the testimony of a brother of the deceased as to a statement alleged
Admission: to have been made by the latter when under
In Extremis. all the attendant facts and circumstances he was *in extremis*. This statement was as follows: "I have fixed his notes, and he will get his money." In the absence of evidence connecting this statement with the notes in controversy, or an identification in some manner of the person referred to, this statement, under the most elementary rules of evidence, was inadmissible. Its admission, unexplained, was irrelevant and could only have been prejudicial to the defendant.

For the reasons stated, this cause will have to be reversed and remanded. In the absence, upon a re-trial, of more substantial proof than has heretofore been adduced, a judgment for plaintiff cannot be sustained.

All concur.

GRACE D. HOLLINGHAUSEN v. EMMA ADE,
Appellant.

Division Two, July 19, 1921.

1. **COMMON-LAW MARRIAGE: Sufficient Proof.** A valid marriage may be entered into between parties willing and competent to contract at common law, without solemnization by minister or officer. Testimony that a man and woman in February, 1910, at Salina, Kansas, entered into a present agreement to become man and wife; that in a few days they returned to the home of her mother in

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Missouri, and introduced themselves as man and wife and received the mother's blessing; that he provided an elegant home where she and he resided happily together until March, 1917; that during all that time they treated each other as man and wife, were introduced as man and wife, and were so regarded among their friends and neighbors, is amply sufficient, without a ceremonial marriage, to establish a common-law marriage.

2. **ALIENATION: Instruction: Conduct Calculated to Prejudice: Omission of Words Cause to Separate.** In an action for damages for the alienation of the affections of plaintiff's husband, in which the petition charged that defendant caused plaintiff's husband to separate from her, prevented communication between them and maliciously prevented a reconciliation, an instruction declaring that "if defendant was intentionally guilty of such conduct as was calculated to prejudice plaintiff's husband against plaintiff and to alienate him from her and to prevent a reconciliation between them, and that plaintiff was thereby deprived of the society, companionship, comfort, protection, aid and affection of her husband, your verdict will be for plaintiff," was not error; and where said instruction as asked declared that "if defendant was guilty of such conduct as was calculated to cause their separation and to alienate the affections," etc., "and did cause him to separate from and abandon plaintiff," its modification by the court so as to omit the words "cause their separation" and "did cause him to separate and abandon plaintiff," the giving of it with these words omitted was not prejudicial error against defendant.
3. ———: ———: **Calculated to Cause.** It is enough that the instruction require that defendant's conduct was calculated to cause plaintiff's husband to separate from her, and to prevent a reconciliation between them, without requiring that it "actually did" cause the separation and prevent the reconciliation. If by the intentional interference of defendant with the marital relations of her brother and his wife, the wife is deprived of the companionship of her husband, she is entitled to a verdict for alienation. A modification of the instruction so as to require the jury to find that defendant's conduct "actually did cause him to separate from and abandon plaintiff" was not necessary; but it is a modification of which defendant cannot complain.
4. ———: **Estoppel: Alimony Paid: Mutuality.** The fact that plaintiff, after her husband's separation from her, brought an action of divorce against him, and in the settlement of her claim for alimony obtained \$7,500 from him, in consideration for her deed releasing all claims to his estate, does not estop her from maintaining an action for damages against his sister for alienating his affections and causing him to separate from her. There was no mutuality

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between the plaintiff in the divorce case and defendant in the alienation suit, and without mutuality there can be no estoppel.

5. ———: **Damages: Injury to Feelings: Loss of Society.** The wife, in her suit for the malicious alienation of her husband's affections and separation from her, can recover damages for injury done to her feelings and the loss of the support, comfort and society of her husband.
6. ———: **Caused by Plaintiff: Unpleaded.** In an alienation case, an instruction telling the jury that if plaintiff herself by her conduct caused her husband to separate from her, the verdict must be for defendant, being an issue not pleaded, should be refused.
7. ———: **Sister's Privilege: Counsel and Advice.** There is no initial presumption of good faith on the part of a sister who interferes in the marital relations of her brother and plaintiff. The law does not presume that advice and counsel given by a sister to her brother to separate from his wife is given in good faith. She does not possess the superior right of a parent.
8. ———: **Duration of Damages: Separation and Divorce.** Where defendant caused plaintiff's husband to separate from her, she is entitled to damages from the time he separated from her, and not simply from the time she obtained a judgment of divorce from him, and not simply from the time he separated from her up to the time of the judgment for divorce.
9. ———: **Excessive Verdict.** There is no scale by which the damages of a wife can be graduated with certainty in an alienation suit, although her husband separated from her on March 31st and died on June 9th. Where the evidence shows a malicious and unlawful interference by a sister in the marital relations between her brother and the plaintiff; that upon his separation from plaintiff the defendant sister persistently and successfully kept them apart, although she knew they were anxious to become reconciled, and succeeded in preventing a reconciliation or even communications between them up to the time of his death, a verdict for ten thousand dollars actual and five thousand punitive damages will not be held to be excessive.
10. **JOINT TORTFEASORS: Judgment Against One: Dismissal as to Other.** Where in a suit for damages for the alienation of the affections of plaintiff's husband, brought against his sister and her husband, as joint tortfeasors, the court at the close of the evidence sustained a demurrer offered by the defendant husband, and the jury brought in a verdict against the remaining defendant, in pursuance to instructions applicable to her alone, it was not error to permit plaintiff to dismiss as to the defendant husband and to enter a judgment of dismissal as to him, and to enter judgment against the defendant wife in accordance with the verdict.

Appeal from Jackson Circuit Court.—*Hon. Thomas J. Seehorn*, Judge.

AFFIRMED.

Walsh & Aylward and *E. A. Setzler* for appellants.

(1) The court erred in refusing to give the peremptory instruction requested by the defendant instructing the jury to find for the defendant, and also erred in refusing to sustain the demurrer of the defendant offered at the close of the plaintiff's evidence. (a) The evidence is insufficient to sustain the verdict. *Leavel v. Leavel*, 122 Mo. App. 666; *Cornelius v. Cornelius*, 233 Mo. 29; *Barton v. Barton*, 119 Mo. App. 528; *Nichols v. Nichols*, 134 Mo. 194; *White v. Ross*, 47 Mich. 172; *Rice v. Rice*, 104 Mich. 371; *Young v. Young*, 8 Wash. 81; *Cooper v. Cooper*, 171 Pac. 7; *Corrick v. Dunham*, 147 Iowa, 320, 126 N. W. 150; *Wolf v. Wolf*, 164 N. W. 107; *Potter v. Hosser*, 177 N. W. 170; *Bruce v. Galvin*, 183 Iowa, 145, 166 N. W. 787; *Cash v. Childers*, 176 Ky. 448, 195 S. W. 191; *Bourne v. Bourne*, 185 Pac. 496. (b) The evidence upon the issue of marriage was insufficient. *Perkins v. Silverman*, 223 S. W. 901; *Cargile v. Wood*, 63 Mo. 514; *State v. Cooper*, 103 Mo. 273; *Williams v. Williams*, 259 Mo. 552, 169 S. W. 619; *Bishop v. Brittan Inv. Co.*, 229 Mo. 730, 129 S. W. 677, Ann. Cas. 1912A, 868; *Topper v. Perry*, 197 Mo. 548, 95 S. W. 208, 114 Am. St. 777; *Clayton v. Wardell*, 4 Comst. 230; *Cunningham v. Cunningham*, 2 Dow, P. C., 482. (2) The court erred in modifying and giving as modified Instruction "G." *Geromini v. Brunelli*, 214 Mass. 492, 102 N. E. 67; *Modisett v. McPike*, 74 Mo. 640; *Hartpence v. Rogers*, 143 Mo. 633; *Barton v. Barton*, 119 Mo. 519; *Butterfield v. Ennis*, 193 Mo. App. 638, 186 S. W. 117; *DeFord v. Johnson*, 251 Mo. 255; *Leavel v. Leavel*, 122 Mo. App. 658; *Murdock v. Dunham*, 206 S. W. 915; *Hall v. C. & C. Co.*, 260 Mo. 351; *Potter v. Hosser*, 177 N. W. 169; *Stillwell v. Stillwell*, 172 N.

W. 177; *Servis v. Servis*, 172 N. Y. 438, 65 N. E. 271; *Hall v. Smith*, 80 Misc. 85, 140 N. Y. Supp. 796. (3) The court erred in modifying and giving as modified Instruction "B." Authorities under point 2. (4) The court erred in giving plaintiff's Instruction "E." *DeFord v. Johnson*, 251 Mo. 256; *Yowell v. Vaughn*, 85 Mo. App. 211; *Wolf v. Wolf*, 181 N. Y. Supp. 372; *Beach v. Brown*, 20 Wash. 266, 43 L. R. A. 114, 72 Am. St. 98; *Prettyman v. Williamson*, 1 Penn. (Del.) 224; *McNamara v. McAllister*, 150 Iowa, 243, 34 L. R. A. (N. S.) 436, 130 N. W. 26, Ann. Cas. 1912 D. p. 463; *Bergman v. Solomon*, 143 Ky. 581, 136 S. W. 1010; *Purdy v. Robinson*, 133 App. Div. 155, 117 N. Y. Supp. 295; *Sockheim v. Miller*, 136 Ill. App. 132. (5) The court erred in refusing to give defendant's Instruction 1. *Leavel v. Leavel*, 122 Mo. App. 654; *Geromini v. Brunelli*, 214 Mass. 492. (6) The court erred in refusing to give defendant's Instruction 2, 3, 4 and 6. *Metcalf v. Tiffany*, 106 Mich. 504, 64 N. W. 479. (7) The court erred in refusing to give defendant's Instruction 5. *Nichols v. Nichols*, 147 Mo. 393. (8) The court erred in refusing to give defendant's Instruction 10. *Allen v. Forsythe*, 160 Mo. App. 267; *Miller v. Miller*, 154 Iowa, 344, 134 N. W. 1038; *Baird v. Corle*, 157 Wis. 565, 147 N. W. 834; *Powell v. Benthall*, 136 N. C. 145; *McGregor v. McGregor*, 115 S. W. 802; *Luick v. Arends*, 21 N. D. 614, 132 N. W. 353. (9) The court erred in not limiting certain evidence by instruction which was received for the sole purpose of showing the state of mind, or affection, of the person making the statements. *McGinnis v. McGlothlan*, 192 Mo. App., 144; *Hayes v. Hayes*, 242 Mo. 155, 271; *Teckenbrock v. McLaughlin*, 209 Mo. 550; *Hardwick v. Hardwick*, 130 Iowa, 230; *Miller v. Miller*, 154 Iowa, 344. (10) The court erred in setting aside the general verdict returned as to both defendants, granting unto the defendant Carl Ade a new trial after the verdict had been received and recorded, permitting plaintiff to dismiss as to him and in entering a judgment against this defendant for the

full amount thereof. Sec. 2097, R. S. 1909; Mo. Constitution, sec. 10, art. 2; sec. 28, art. 2; sec. 30, art. 2; Dartmouth College Case, 4 Wheat. 518, 4 L. Ed. 629. (11) The court erred in refusing to sustain defendant's motion for a new trial for the reason that the jury absolutely ignored and disregarded the instructions of the court and refused to consider or follow the same. Shohoney v. Railway, 223 Mo. 649; Hitz v. Railway Co., 152 Mo. App. 687; Payne v. Railway Co., 129 Mo. 405; Ellis Lbr. Co. v. Johns, 152 Mo. 516. (12) The verdict of the jury was grossly excessive, the result of passion and prejudice against the defendants, and the defendants were thereby deprived of a fair and impartial trial. Spohn v. Railway Co., 87 Mo. 84; Spiro v. Transit Co., 102 Mo. App. 250; Fuller v. Robertson, 230 Mo. 32; Allen v. Forsythe, 160 Mo. App. 262; Hughey v. Eysell, 167 Mo. App. 565; Dailey v. City of Columbia, 122 Mo. App. 21; Winkelman v. Maddox, 119 Mo. App. 658; Miller v. Dryden, 34 Mo. App. 602; Eichelman v. Weiss, 7 Mo. App. 87; Ferguson v. Thacher, 79 Mo. 511; Schweickhardt v. St. Louis, 2 Mo. App. 583; Crow v. Crow, 124 Mo. App. 125; Spalding v. Bank, 78 Mo. App. 374; Beshars v. Banking Assn., 73 Mo. App. 293; Plate Glass Co. v. Peper, 96 Mo. App. 505; Singleton v. Exposition Co., 172 Mo. 306; Dyer v. Combs, 65 Mo. App. 152; Haumueler v. Ackerman, 130 Mo. App. 390; Newton v. Railroad, 168 Mo. App. 199; Cottell v. Pub. Co., 88 Mo. 356; Poulson v. Collier, 18 Mo. App. 604; Real Estate Co. v. Surety Co., 276 Mo. 183; Wonderly v. Haynes, 186 Mo. App. 82; Hurley v. Kennally, 186 Mo. 225; Miller v. United Rys., 155 Mo. App. 547.

J. M. Johnson, L. N. Dempsey and Donald W. Johnson for respondent.

(1) On demurrer to the evidence. (a) The evidence is sufficient to sustain the verdict. Claxton v. Pool, 182 Mo. App. 13; Knapp v. Knapp, 183 S. W. 576; Wagner v. Wagner, 204 S. W. 390; Surbeck v. Surbeck, 208 S. W.

645; *Nichols v. Nichols*, 147 Mo. 387; *Linden v. McClintock*, 187 S. W. 82; *Yowell v. Vaughn*, 85 Mo. App. 206.

(b) The evidence upon the issue of marriage is sufficient. *Perkins v. Silverman*, 223 S. W. 895; *State v. Cooper*, 103 Mo. 273; *Cargile v. Wood*, 63 Mo. 501; *Butterfield v. Ennis*, 193 Mo. App. 638; *Davis v. Stouffer*, 132 Mo. App. 555.

(2) Not necessary to show that there was affection and that defendant had completely alienated it. *DeFord v. Johnson*, 152 Mo. App. 209; *Linden v. McClintock*, 187 S. W. 82; 3 *Elliott on Evidence*, sec., 1650; 15 *Am. & Eng. Ency. Law* (2 Ed.) 862; *DeFord v. Johnson*, 251 Mo. 244.

(3) There was no error in the giving of modified Instruction "G." *Nichols v. Nichols*, 147 Mo. 387; *Barton v. Barton*, 119 Mo. App. 507; *Modisett v. McPike*, 74 Mo. 636; *Hartpence v. Rogers*, 143 Mo. 633.

(4) Plaintiff's modified Instruction "B," is correct. Authorities under Point 3.

(5) There is no error in Instruction "E." The evidence strongly tends to show actionable interference between husband and wife by the defendant from the date of the separation, March 31, 1917, which continued until the death of the husband on June 9, 1917. Plaintiff was entitled to recover all damages she sustained in consequence of such interference, including the destruction of her right to consortium. *Nichols v. Nichols*, 147 Mo. 387.

(6) The court did not err in refusing to give defendant's Instruction No. 1, since there was ample evidence to take to the jury the question of actual malice. *Butterfield v. Ennis*, 193 Mo. App. 638. Where, as here, the defendant attacks the character of the plaintiff, no other proof of actual malice would be required. Therefore the charge that plaintiff was not the wife, but was the mistress of defendant's brother if untrue will support a finding of actual malice. *Cornelius v. Cornelius*, 233 Mo. 1, 25.

(7) Defendant's Instructions 2, 3, 4 and 6 were properly refused. The divorce and settlement therein of property rights did not preclude plaintiff from maintaining her action for alienation of affections. *DeFord v. Johnson*, 251 Mo. 244; 21

Cyc. 1620; Clow v. Chapman, 125 Mo. 101; Modisett v. McPike, 74 Mo. 646; Nichols v. Nichols, 147 Mo. 387. (8) There was no error in refusing defendant's Instruction Number 5, which as a prerequisite to a recovery by plaintiff required the jury to find that the defendant "lawfully and maliciously induced the said Carl Hollinghausen to cease to live with plaintiff, etc." The gravamen of the cause of action submitted to the jury was not that the defendant caused the separation, but that she prevented a reconciliation. DeFord v. Johnson, 152 Mo. App. 209; Linden v. McClintock, 187 S. W. 82. (9) There was no error in refusing defendant's Instruction 10. (a) Because there is no initial presumption of good faith on the part of a brother or sister who interferes in the marital relations of a plaintiff. Barton v. Barton, 119 Mo. App. 529. (b) The instruction was fully covered in defendant's Instruction 15 given by the court. (c) There is no room in this case under the evidence for indulging in initial presumptions, since the rule is well settled that presumptions should not be indulged where the issue of fact is fully covered by evidence. Wison v. Railroad Co., 141 Mo. 425; Lynah v. Street Ry. Co., 112 Mo. 420; Stack v. Baking Co., 223 S. W. 97. (d) The instructions throughout both for plaintiff and defendant imposed the burden of proving malice where it belonged, upon the plaintiff, and the verdict of the jury necessarily found that the defendant had not acted in good faith, but in malice. (10) In view of the peremptory instruction to the jury to return a verdict for the defendant, Carl Ade, the court did not err in setting aside the verdict as to that defendant and permitting the plaintiff to dismiss him from the action, and then entering judgment on the verdict against the remaining defendant, Emma Ade. The defendant, Emma Ade, being sued as a joint tortfeasor had no right either to have her co-tortfeasor sued or kept in the case, since between such wrongdoers there is no right of contribution. Berkson v. Cable Ry. Co., 144 Mo. 211; Rogers v. Rogers, 177 S. W. 382; Vo-

dicka v. Sette, 223 S. W. 582; State ex rel. Dunklin Co. v. Blakemore, 205 S. W. 626. (11) The verdict was not excessive and there is no indication of passion or prejudice on the part of the jury. Gross v. Gross, 73 S. E. (W. Va.) 961; DeFord v. Johnson, 177 S. W. 577; Fuller v. Robinson, 230 Mo. 22; Waldron v. Waldron, 45 Fed. 315; Williams v. Williams, 30 Colo. 51; Lockwood v. Lockwood, 67 Minn. 476; Scherph v. Szadeczky, 1 Abb. Pr. 366; Speck v. Gray, 4 Wash. 589; Duberley v. Gunning, 4 T. R. 651; Smith v. Ry. Co., 180 S. W. 1936; State ex rel. v. Ellison, 268 Mo. 225.

MOZLEY, C.—This action was brought in the Jackson County Circuit Court, Missouri, in Kansas City, by plaintiff, Grace D. Hollinghausen, against defendants, Carl Ade and Emma Ade, his wife, to recover actual damages in the sum of \$25,000, and punitive damages in the sum of \$25,000 for alienating the affections of her husband, Carl Hollinghausen, and thereafter preventing a reconciliation between them.

The petition alleges that plaintiff and Carl Hollinghausen were lawfully married at Salina, Kansas, on the — day of February, 1910, and thereafter lived happily together until the 31st day of March, 1917. That May the 11th, 1917, she obtained a divorce from her said husband on account of certain grievous misdeeds of her said husband, which are fully set out in "Exhibit A" in appellant's abstract.

It further alleges a wicked and malicious conspiracy between defendants, who well knew they were so living together as man and wife, to bring about an alienation of the affections of her said husband, and a wicked and malicious attempt (which it is alleged was successful) to prevent a reconciliation between them, and prayed damages as above stated.

Defendants answered with a general denial of the averments of the petition, and pleaded as defensive matter the same divorce proceedings; that said divorce

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was obtained by plaintiff against defendant on account of wrongs, by default, he having been duly served with summons. That pending said divorce proceedings a written contract was entered between plaintiff and her said husband by virtue of which her right to alimony and all rights she had in defendant's estate on account of being his wife were fully adjusted and finally settled for the sum of \$7,500; that said adjustment was made voluntarily and with full knowledge on the part of plaintiff, and that it operated to estop her from recovering in the instant action.

The reply was a general denial of the new matter.

With the issues thus framed, trial was had before the court and a jury, which returned the following verdict:

"We, the jury, find for plaintiff and assess her actual damages at ten thousand dollars. We further allow her exemplary damages at five thousand dollars.

"GEORGE W. ERNST, Foreman."

Two days thereafter, to-wit, February 19, 1919, the following record entries were made.

"Now the court, of its own motion, on account of errors in instructions, sets the verdict aside in this case as to Carl Ade and grants Carl Ade a new trial of this cause.

"Now plaintiff dismisses this cause as to Carl Ade, defendant herein.

"Now the court orders judgment entered in accordance with the verdict of the jury." To which both defendants excepted.

Said judgment was to the effect that plaintiff have and recover from defendant the amount specified in the verdict with costs of suit and that she have execution therefor.

Then followed the usual judgment of dismissal as to Carl Ade.

Defendants offered no testimony.

We will further refer to the facts hereafter.

I. The first assignment will be determined by the evidence.

Under this assignment it is insisted that the evidence was insufficient to establish a common-law marriage between plaintiff and Carl Hollinghausen.

Without setting the testimony on this point out in full, it is sufficient to state that it shows that these parties, at Salina, Kansas, on the day of February, 1910, entered into a present agreement to become man and wife; that in a few days they returned to the home of the mother of plaintiff, at Kansas City, Missouri, and introduced themselves as man and wife and received her blessings; that he provided an elegant home where he and plaintiff resided happily together until March 31, 1917, about seven years; that during that time they were both anxious to have a child born, but on account of some impediment standing in the way, he had an operation performed on her which cost him about \$350; that during all this time they treated each other as man and wife, were introduced as man and wife, and were so regarded among their friends and neighbors.

Common-Law
Marriage.

The deposition of Emma Ade was taken by plaintiff and introduced in evidence which we quote from as follows:

"Q. Prior to that time where was his home? A. Why, he lived at Twenty-fifth and Troost.

"Q. In an apartment? A. Yes, sir.

"Q. And who lived with him or with whom did he live there at Twenty-fifth and Troost? A. Grace Hildebrand.

"Q. She is the plaintiff in this action? A. Yes, sir.

"Q. Were they living there together in the apartment?

"MR. ALYWARD: If you know?

"Q. Yes, if you know. You needn't testify to anything you don't know. Were they living there together? A. I suppose they were living there together.

"Q. I am asking you for your knowledge. Now, how do you know they were living there together? A. Why, because they were there together.

"Q. You saw them there? A. Yes, sir.

"Q. How long did they live there together in that apartment? A. Why, I am sure I don't know how long they lived there.

"Q. No, I don't expect you to give it accurately, Mrs. Ade, but about how long they lived in those apartments there? A. Several years.

"Q. Did anyone live there with them? A. Not that I know of.

"Q. Did you visit them there in the apartments? A. Yes, sir.

"Q. About how often did you visit them there? A. Just occasionally.

"Q. Well, give us an idea about how long it was, once a week or once a month. A. Why, there was for a short time once a week and then occasionally it was longer. Sometimes a month, six weeks, eight weeks we didn't see one another.

"Q. During that two or three years that they lived there together in the apartment at Twenty-fifth and Troost did they visit you at your house sometimes? A. Yes, sir.

"Q. How often did Mr. Hollinghausen and the plaintiff visit you there at your house during the time they were living at Twenty-fifth and Troost? A. Just as I stated before, just occasionally.

"Q. Occasionally? A. Yes, sir.

"Q. Once a week or sometimes not so often? A. Yes, sir.

"Q. Yes, and they came there and would sometimes have meals? That is, they were entertained at your house. A. Yes, sir.

"Q. And sometimes they would entertain you and Mr. Ade at their house? A. Yes, sir.

"Q. And you were on good terms with them. A. Yes, sir. . . .

"Q. State what your conversation with your brother was on that occasion. A. As I stated, it was after she shot the negro; and it was in the newspapers that my brother was married.

"Q. Yes? A. I, the next day or two later, went to him and said, 'Brother if you were married why didn't you come and tell me? I am your only sister. Why didn't you tell me you were married? I never knew anything about it.' And my brother said, 'Emma I am not married. I am simply defending Grace for fear she may have trouble about the shooting affair.'"

We think this testimony was ample sufficient for submission to the jury for their determination, and the demurrer was properly refused.

And if the first part of said demurrer was intended to strike at the sufficiency of the petition as not stating facts sufficient to constitute a cause of action against defendants, without setting said petition out further, we think it stated a cause of action and it was good after verdict anyway. [Sec. 2119, R. S. 1909].

A valid marriage may be entered into between parties willing and competent to contract at common-law. [Dyer v. Brannock, 66 Mo. 391; State v. Cooper, 103 Mo. 266; State v. Hansbrough, 181 Mo. 348; Topper v. Perry, 197 Mo. 531; Plattner v. Plattner, 116 Mo. App. 405; Butterfield v. Ennis, 193 Mo. App. 638; 18 R. C. L. 391, par. 12.]

The jury has determined this question in favor of plaintiff, and their verdict is binding on us.

II. Instruction "G" as originally drawn, so far as is necessary to quote, reads as follows:

"If, therefore, you believe and find from the evidence that plaintiff and Carl Hollinghausen were husband and wife, and that defendant Emma Ade was intentionally guilty of such conduct as was calculated to cause their separation and to alienate the affections of the said Carl Hollinghausen, and by reason thereof the defendant did cause the affections

Causing
Separation.

of said Carl Hollinghausen to be alienated from plaintiff, and did cause him to separate from and abandon plaintiff," etc.

Said instruction as modified omitted that part of the original instruction relating to the defendant being guilty of conduct that was calculated to cause their separation. The original instruction manifestly submitted the case on a wrong theory—that of the conduct of the defendant causing the separation between these parties. The case was submitted to the jury solely on the averment in the petition that a reconciliation was wickedly and maliciously prevented between plaintiff and her husband; that he was kept separate and apart from her and communication between them prevented.

Where an instruction tenders to the finding of the jury the facts of an issue not in the case it is erroneous and would have been reversible error. [DeDonato v. Morrison, 160 Mo. 581, l. c. 591; Glass v. Gelvin, 80 Mo. 297; Silverthorne v. Summit Lumber Co., 190 Mo. App. 716.] We rule that said instruction was correct as modified and overrule defendant's objection thereto.

III. Instruction "B" as originally presented so far as is necessary to quote, reads as follows:

"If, therefore, you believe from the evidence that plaintiff and Carl Hollinghausen were husband and wife, and that on or about March 31st, 1917, they quarrelled, and the said Carl Hollinghausen separated from plaintiff, and that thereupon defendant, Emma Ade, was intentionally guilty of such conduct as was calculated to prejudice plaintiff's husband against plaintiff and alienate him from her and to prevent a reconciliation between them, and that plaintiff was thereby deprived of the society, companionship, comfort, protection, aid and affection of her husband, your verdict will be for plaintiff."

Said paragraph of said instruction, as modified, reads as follows:

Calculated
to Cause.

"If, therefore, you believe from the evidence that plaintiff and Carl Hollinghausen were husband and wife, and that on or about March 31st, 1917, they quarrelled, and the said Carl Hollinghausen separated from plaintiff, and thereafter defendant, Emma Ade, was intentionally guilty of such conduct as was calculated to and actually did," etc. Then the instruction concludes as above.

It will be observed that the modified instruction differs from the original in adding the words, actually did, after the words, calculated to.

We think the original instruction was erroneous in that it only required the jury to find that the alleged conduct of defendant was merely calculated to cause her husband's alienation and prevent a reconciliation between them, whereas, as modified the jury were required to find that said conduct actually did produce such result. The modified instruction "B" was correct, and we overrule defendant's objection thereto.

Instruction "A" and "E" announce correct propositions of law and we, therefore, overrule defendant's objections thereto.

IV. The court did not err in refusing to give defendant's instruction number 1, to the effect that there was no evidence of actual malice on the part of defendant toward the plaintiff, and that issue is withdrawn from your consideration. Under this record said instruction did not correctly state the law. A correct instruction on the subject of malice was given at the request of plaintiff. We overrule defendant's objection to the refusal of the court to give said instruction.

V. Instructions, 2, 3, 4, and 6 were properly overruled. Numbers 2, 3 and 4 related to the proposition asserted by defendant that if the jury found that plaintiff had made the settlement pleaded in the answer by which she had received \$7,500 in full

Malice.

Estoppel.

of alimony and all her property rights in her husband's estate, that she was estopped from recovering in this action. This settlement had nothing to do with the instant case, and defendant was not a party to it; there was no mutuality respecting the matter as between plaintiff and defendant. "Mutuality is a necessary ingredient of an estoppel. There can be no estoppel upon one party unless the other party is equally estopped." [Hempstead v. Easton, 33 Mo. 142; City of Unionville v. Martin, 95 Mo. App. 28, and authorities cited at l. c. 39; DeFord v. Johnson, 251 Mo. 244.]

The court properly refused these instructions.

VI. Instruction 5 was properly refused because it sought to submit to the jury an issue not in the case.

Instruction 6 tells the jury that plaintiff could not recover damages for injury done to her feelings or the loss of support, comfort and society of her husband and these elements would be withdrawn from the consideration of the jury. These were elements plaintiff *could* recover for, and, hence, the instruction was properly overruled.

Instruction 7 told the jury that if plaintiff *caused the separation* between her and her husband and was not wrongfully induced to do so by either of the defendants, their verdict would be for defendants. The cause of their separation, as above seen, was not an issue of the cause, and therefore the instruction was properly refused.

Caused by
Plaintiff.

Instructions 8 and 11 were properly refused.

VII. Instruction 10 told the jury that the *law presumes* that counsel or advice given by a sister to brother is given in good faith and from proper motives and honest impulses, the burden of proving that such was not the case was shifted to plaintiff to prove by a preponderance of the testimony that such advice was not given in good faith, and unless the jury find such facts exist to their personal satisfaction they will find for defendant, Emma Ade.

Sister's
Privilege.

We agree with plaintiff that there is no initial presumption of good faith on the part of a brother or a sister who interferes in the marital relations of a plaintiff. This is vastly different from a case of parents interfering between husband and wife.

In the case of *Barton v. Barton*, 119 Mo. App. 1. c. 532, it was held: "We are not to be understood as intimating that a parent may, *without good cause*, influence a child to separate from a spouse; to do so is a tort for which the parent, like any other person, is liable. We mean to say that the law recognizes a superior right of interference on the part of a parent; and will justify the interference for a cause which would be no justification in favor of another person. This rule prevails because of the law's respect for that anxiety parents feel for their children which impels to efforts to promote a child's welfare and happiness. This natural impulse prompts advice and assistance in domestic troubles, as well as in others."

We rule that the instruction was properly refused.

VIII. It is assigned as error that the court modified and gave instruction 20. Said instruction as originally requested by defendant reads as follows:

"The court instructs the jury that in the event your finding is for the plaintiff, you are only permitted to allow damages, if any, for the loss of affection, the society, companionship, and comfort of the said Carl Hollinghausen from the 25th day of April to the date of his death, on June 9, 1917."

Duration of
Damages.

The modified instruction changed the date from when the damages accrued to March 31, 1917, to the date of his death June 9, 1917. There was no error in modifying said instruction, and the assignment is overruled.

IX. We rule that defendant's peremptory demurrers were properly overruled.

Plaintiff's instructions given to the jury presents the case sufficiently clear for their ready understanding,

and when read in connection with the thirteen given at defendant's request, which were quite liberal in her behalf, we think there is no doubt but that the case was properly instructed on.

X. Error is assigned in that the court failed to limit certain evidence by instruction which was received for the sole purpose of showing the state of mind, or affection, of the person making the statement. If defendant desired such instruction it was her duty to ask the court to give one. [Ratten v. C. E. Ry. Co., 120 Mo. App. 270; Sotebier v. Transit Co., 203 Mo. l. c. 721; Brown v. Globe Printing Co., 213 Mo. 611-613.] We overrule the assignment.

XI. Lastly defendant makes the point that the verdict is grossly excessive and is the result of passion and prejudice.

There is nothing in this record that shows the verdict was the result of *passion and prejudice*, and we cannot hold that it was.

**Excessive
Verdict.**

As to being grossly excessive both sides cite the case of Fuller v. Robinson, 230 Mo. 32, to show the *pro et con* of the contention.

The citation of authorities on this point usually is only valuable in the particular case in announcing the general rule of this court on the question. But in the instant case, the case cited, *supra*, appears to have a concrete applicability. We quote from it as follows:

"A verdict for \$10,000, in a suit for alienation of the affections of plaintiff's wife, is not excessive. There is no scale by which damages can be graduated with certainty in such cases, and the laws commits to the jury the duty of estimating the wrong done to the plaintiff, and with their discretion the court will not interfere except where they have clearly been actuated by unreasoning prejudice."

Defendant argues that plaintiff could recover damages only from the date of the separation to the date

of the divorce, which she calculates was 43 days. This is erroneous. As shown above, plaintiff requested an instruction to the effect that, if she recovered at all, she could recover until June 9, 1917, the date of the husband's death, and the court modified it making it read from March 31, 1917, the date of the separation, until June 9, 1917, the date of his death. Time is not of the essence of the plaintiff's right to recover; that right rests upon the wrong done her by defendant. She defendant's wicked and malicious efforts to keep plaintiff and her husband apart is abundantly disclosed by the evidence. It shows that the husband immediately came to her home when the separation occurred, and from that day until the date of his death she persistently and successfully kept them apart, so that they could not see each other, although she knew that they were anxious to become reconciled.

We overrule the point.

From what has been said above it follows that defendant's assignments that the court erred in overruling her motion for new trial and to arrest the judgment were properly overruled.

This disposes of all of defendant's assignments adversely to her contentions.

This record presents an almost unparalleled instance of wicked, malicious and unlawful interference by defendant in successfully preventing plaintiff and her husband from affecting a reconciliation, and we affirm the judgment. It is so ordered. *Railey and White, CC.*, concur.

PER CURIAM:—The foregoing opinion of MOZLEY, C., is hereby adopted as the opinion of the court. All of the judges concur.

ON MOTION FOR REHEARING.

PER CURIAM:—The appellant complains of error in the giving of Instruction G, which is substantially, if

not literally, a copy of Instruction B before it was modified by the court. The portion complained of by appellant is as follows:

"And that, thereupon, defendant Emma F. Ade was intentionally guilty of such conduct as was calculated to prejudice plaintiff's husband against plaintiff and to alienate him from her and to prevent a reconciliation between them, and that plaintiff was thereby deprived of the society, companionship, comfort, etc., . . . your verdict will be for the plaintiff."

I. On a reconsideration of the case, we see no error in this instruction, nor was there any need for the modification of Instruction B. If the jury found that by the intentional interference of Emma Ade complained of, the plaintiff was deprived of the companionship of her husband, then plaintiff was entitled to a verdict. The appellant's criticism of the instruction is without merit.

II. Appellant complains of the setting aside of the verdict against both of the defendants, the granting of a new trial as to the defendant Carl Ade; the dismissal of the case as to him, and the rendition of judgment against the defendant Emma Ade.

When the evidence for the plaintiff was closed, the court sustained a demurrer as to the defendant Carl Ade, and gave an instruction directing the jury to find a verdict in his behalf. As will be seen by instructions B and G, given for the plaintiff, the court submitted the case solely on the issue between the plaintiff and the defendant Emma Ade; that is, if the jury found Emma Ade guilty of the conduct charged and plaintiff was thereby deprived of the companionship, etc., of her husband, the verdict should be for the plaintiff. It authorized a verdict solely against Emma Ade. Carl Ade was out of the case and no verdict could be or was in fact rendered against him. All that was necessary was a formal dis-

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missal as to him. So it is apparent that the verdict and judgment disposed of all the parties and issues in the case.

Appellant relies on Hughey v. Eysell, 167 Mo. App. 564, l. c. 565. As said in State ex rel. Dunklin County v. Blakemore, 275 Mo. 695, l. c. 703, it is unnecessary to discuss the soundness of the rule as applied in that case. The trial court, by its instruction, withdrew the case from the jury as to Carl Ade, and submitted the issues solely between the plaintiff and the appellant. We must assume the jury had sufficient intelligence to understand the instructions of the court and that they were not authorized to return a verdict against Carl Ade. There was no occasion for the court to set aside the verdict as against Carl Ade and grant him a new trial, for the simple reason that no verdict was returned against him.

The motion for rehearing is overruled. All concur.

THE STATE ex rel. AMERICAN CENTRAL INSURANCE COMPANY v. GEORGE D. REYNOLDS
et al., Judges of St. Louis Court of Appeals.

Division Two, July 19, 1921.

1. **ACTION AT LAW: Equitable Defense: Subrogation: Destroying Action.** To convert an action at law into a suit in equity the matters set up in the answer as constituting the equitable defense must, taken as true, destroy plaintiff's right to recover, and must ask for affirmative relief on that ground.
2. ———: ———: **Action on Insurance Policy: Subrogation to Plaintiff's Right.** Where the trustee and mortgagee brought action on a fire insurance policy, which contained a rider to the effect that, when the company shall pay the loss to the trustee or mortgagee and claim no liability to the mortgagor existed, it shall be legally subrogated to the rights of the party to whom the payment is made, said rider did not purport to destroy the plaintiffs' legal action on the policy as their interest might appear, and a plea of

its provisions in defendant's answer, which also denied liability on the policy, did not convert the action at law into a suit in equity.

3. ———: ———: ———: ———: **No Payment.** Where the trustee and mortgagee bring suit on a fire insurance policy, which contains a clause that the company, upon paying the loss to them, may be subrogated to all their rights under any securities executed by the mortgagor and held by them, a plea asking that defendant be so subrogated is unavailing, and so far as the plaintiffs are concerned states no equity, if the defendant has neither paid plaintiffs' demand nor paid the amount thereof into court for their benefit. There can be no subrogation to a plaintiff's rights until his demand has been paid.
4. **ACTION ON INSURANCE POLICY: Brought by Trustee and Mortgagee: Bringing in Mortgagor.** In an action at law on a fire insurance policy brought by the trustee and mortgagee for the amount of the insurance upon the mortgaged property, it is not proper to require the mortgagor or his grantee to appear and plead to plaintiff's cause of action, since they are not only unnecessary parties, but have no interest in the controversy between the plaintiffs and the defendant insurance company.
5. ———: ———: ———: **Concealment of Real Owner: Knowledge of Company: Action at Law.** Property was conveyed to Martin and the deed recorded, and a fire insurance policy was issued to him as the insured; immediately thereafter, by an unrecorded deed, Martin conveyed to Krupnick, who was in fact the beneficial owner, and who executed certain notes to one of the plaintiffs and secured them by a deed of trust to the other as trustee, and said trustee and the payee of the notes bring suit on the policy. Defendant, by answer, prayed that Martin and Krupnick be made parties defendant, and pleaded that the policy was void because of the concealment from defendant of lack of title in Martin and of the interest of Krupnick. Being made parties, Martin disclaimed any beneficial interest and averred that the property was conveyed to him for the purpose of having it conveyed to Krupnick; Krupnick pleaded that he was the owner of the real estate, subject to the deed of trust; that defendant had full knowledge of all the facts before and after said policy was written, and with such knowledge received and retained the premium, and that by reason of such knowledge the policy was not void. In its counter-plea, defendant denied it had said knowledge. *Held*, that these issues were purely legal in their nature and triable by a jury; and that the action on the policy was not converted into a suit in equity, by a further plea by defendant that it was subrogated, by the terms

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of the policy, to the mortgagee's right to the notes executed by Krupnick, for such plea did not purport to destroy Krupnick's right of action, and even if it had it would have been unavailing, because defendant had not paid plaintiff's demand.

6. ———: ———: ———: ———: **Waiver: Authority of Agent: Facts upon Certiorari.** Upon *certiorari* to the Court of Appeals, in which it was ruled that the defendant insurance company was charged with whatever knowledge was acquired by its inspector a few weeks after the policy was issued, it will not be held by the Supreme Court that the facts shown in evidence were not sufficient to establish such knowledge or the inspector's authority to waive any concealment by the insured of the true ownership of the insured property, where, upon the partial facts recited in the opinion of the Court of Appeals, no ground for quashing its judgment appears, the entire evidence being presumably before the Court of Appeals, and only such portions of it can be considered by the Supreme Court as appear from its opinion.

Certiorari.

WRIT QUASHED.

Leahy & Saunders and *David W. Voyles* for relator.

(1) With reference to whether the opinion predicates waiver upon alleged knowledge of Brown, we quote from the opinion of the respondents, as follows: "It (appellant) knew of the claim or change of ownership certainly a few weeks after issue of the policy." Since the status of the parties as of the date of the fire must have been in contemplation, and the adjuster learned nothing, according to the opinion of the respondents, until after the fire, this ruling in the opinion could only have referred to the knowledge, if any, acquired by Brown. (2) The right of an insurance company to subrogation is one of equitable cognizance, and a court of equity, having jurisdiction of the subject-matter, has power to determine all incidental questions effecting the right claimed. *Traders Ins. Co. v. Agricultural Ins. Co.*, 142 Ill. 338, 346. (3) The power of a court of equity is not limited to settle the rights of parties upon what has been done in the past, but it reaches forth and declares their rights and duties for the future, and in the exercise of this power

it will decree that when sureties have paid the debt of their principal they shall be subrogated to the rights of the creditor. *City of Keokuk v. Love*, 31 Iowa, 119. (4) The doctrine requiring payment as a condition to the right of subrogation can only be invoked by the creditor for his own protection; and is never applied to defeat contract obligations, in the interest of the debtor alone. *Skinkle v. Huffman*, 52 Neb. 20; *Keokuk v. Love*, 31 Iowa, 124; *Motley v. Harris*, 1 Lea (Tenn.) 577, 583; *Sheldon on Subrogation* (2 Ed.) sec. 128. See also, *Comins v. Pottle*, 35 N. J. Eq. 94. (5) The contract in this case by which, alone, the mortgagee could acquire rights in the insurance fund if the policy was void as to the mortgagor, specifically provided for subrogation. (6) Payment of the demand of a creditor without agreement that the securities be assigned or kept on foot for the benefit of the payor, extinguishes the debt absolutely. *Sandford v. McLean*, 3 Paige (N. Y.) 117, 23 Am. Dec. 773. And subrogation will never be decreed in favor of a mere volunteer. 25 R. C. L. sec. 11, Article "Subrogation." Nor in favor of one who fails to assert his rights until rights of others intervene. *Id.*, sec. 76. Hence, there is no equity in the contention that it was the duty of appellant to pay the policy without an assignment with the certainty that the mortgage would be surrendered and released, compelling appellant to take the chance that rights of third parties might intervene. Especially is this true, in view of the fact that an assignment *pro tanto* would in no manner have been detrimental to the mortgagee. (7) Where a contract of insurance provides for an assignment, the mortgagee is not entitled to payment without assigning the whole, or so much of, the security as would cover the amount due under the policy. *Fire & Marine Ins. Co. v. Wetmore*, 32 Ill. 221; *Kip v. Ins. Co.*, 4 Edw. Ch. (N. Y.) 86; *Attleborough v. Security Ins. Co.*, 168 Mass. 148; *Fire Ins. Co. v. Fidelity Trust Co.*, 123 Pa. St. 516. (8) No demurrer was filed, or any other objection made by any of the parties to the sufficiency of

the cross-bill; the contention that it did not present a case in equity because the insurance company had not paid the policy, could not have availed Krupnick; yet he was made a party and failed to make the contention below; the point could only have been raised by the mortgagee, who, a party, failed to make it. Such contention could only have been made by the mortgagee, coupled with a showing that some detriment flowed to him from an enforcement of the contract providing for subrogation.

George B. Webster and Elliott W. Major for respondents.

(1) It was not error on the part of the circuit court to try the issues between Hayden and Meininger, as plaintiffs, and the relator, as defendant, by a jury, nor on the part of the Court of Appeals to affirm the judgment. R. S. 1909, sec. 1989; *Rand-McNally Co. v. Wickham*, 60 Mo. App. 44; *Barnard Co. v. Monett Mfg. Co.*, 79 Mo. App. 153. The amended answer and cross-bill of the relator did not convert their action at law into a proceeding in equity, since it prayed no equitable relief against them. *Lincoln Trust Co. v. Nathan*, 175 Mo. 32; *Thompson v. Bank*, 132 Mo. App. 225. Subrogation is a species of relief which falls within the concurrent rather than the exclusive jurisdiction of equity. 4 Pomeroy on Eq. Jurisprudence (3 Ed.) sec. 1416. There is no conflict between anything in the opinion of the Court of Appeals in this case and the rule of the *Lowenstein Case*, 227 Mo. 100. (2) The opinion of the Court of Appeals in this case does not conflict with the decisions of this court in such cases as *Myers v. Schuchmann*, 182 Mo. 159, or *Wendover v. Baker*, 121 Mo. 273, because in those cases there was in the answer a prayer for affirmative equitable relief against the plaintiff, while here there is none. (3) There is no conflict with the opinion in *Carter v. Metropolitan Life Ins. Co.*, 275 Mo. 84, which case involved the fraudulent alteration of a policy, and was

in effect a proceeding to reform, and rested wholly upon fraud or mistake. (4) The Court of Appeals did not come into conflict with the opinion of this court in the case of *James v. Mutual Life Ins. Co.*, 148 Mo. 1, or any other opinion of this court, in its holding that the relator had knowledge of the true condition of the title, and waived its right to avoid the policy by retaining the premium and failing to act within reasonable time. Laying aside the evidence of Krupnick's alleged conversation with Brown, the inspector, there was still ample ground and reason for the holding of the Court of Appeals in the testimony of Olsen, the relator's adjuster, in which he admitted having acquired knowledge of Krupnick's ownership of the property insured while adjusting another loss arising out of the same fire.

RAILEY, C.—Petition for *certiorari*, by the State, on the relation of American Central Insurance Company, a corporation, against George D. Reynolds et al., judges of the St. Louis Court of Appeals; to have this court quash the record of the Court of Appeals in the case of C. E. Hayden, Trustee, and others, against the American Central Insurance Company, 221 S. W. 437, and following. It is contended by the relator here that the opinion of the Court of Appeals contravenes certain rulings of this court.

The facts, as set out in the above opinion, read as follows:

“This is an action on an insurance policy for \$3,100, for a term of three years from January 21, 1914, at an annual premium of \$46.50, the policy issued in favor of George F. Martin, as owner. By rider attached, in case of loss, the amount of insurance is payable to C. E. Hayden, trustee for Arthur O. Meininger. The suit was instituted by Arthur O. Meininger, mortgagee under the two deeds of trust, herein after referred to, and C. E. Hayden, trustee in those deeds of trust, against appellant, to recover, under the mortgage clause attached to the policy, the amount of insurance covered,

total loss of the property insured, a frame dwelling, known as 1725 Princeton Avenue, being averred. Judgment was demanded for \$3,100 under the policy, with interest from March 6, 1915, at six per cent per annum, and for \$310 as damages for alleged vexatious delay, and for a reasonable attorneys' fee. The suit was filed May 7, 1915. Entry of appearance made by appellant, defendant below.

"On February 9, 1916, appellant filed its amended answer, and what is designated by appellant as a cross-bill, setting up in the answer that the policy was issued in the name of George F. Martin, as insured, but that the property insured was in fact owned by one Adolph Krupnick at the time the policy was issued, and it prayed that Martin and Krupnick be made parties defendant. Appellant averred that said policy was void, because of the concealment from it of lack of title of Martin and of the interest of Krupnick. By way of its cross-bill, as it is called by appellant, it set up the same facts, averred that by reason thereof the policy was void, and sets out the subrogation clause as follows:

" 'It is also agreed that whenever this company shall pay to the mortgagee or trustee any sum for loss under this policy, and shall claim that as to the mortgagor or owner, no liability therefor existed, it shall at once and to the extent of such payment be legally subrogated to all the rights of the party to whom such payment shall be made, under any and all securities held by such party for the payment of said debt. But such subrogation shall be in subrogation to the claims of said party for the balance of the debt so secured. Or this company may, at its option, pay the said mortgagee or trustee the whole debt so secured, with all the interest which may have accrued thereon to the date of such payment, and shall thereupon receive from the party to whom such payment shall be made an assignment and transfer of said debt, with all securities held by said party for the payment thereof.'

"Appellant then avers that if plaintiff, as trustee or mortgagee, had any interest in or title to the property, or

any right to the insurance under the policy, it (defendant insurance company), as insurer under the policy, claims its right to be subrogated to the rights of the mortgagee under the mortgage securities. The defendant further avers that Martin and Krupnick are necessary parties, interested in the subject-matter of the case, and that a complete determination of the action cannot be had without the presence of both of them.

“ ‘In that the defendant herein claims the right to be subrogated to the rights of the plaintiff, Arthur O. Meininger, in and to the securities held by him, constituting a first and second lien, as stated in this answer, on the real estate, the legal title of which is in said George F. Martin, and the equitable title of which is in said Adolph Krupnick, and defendant therefore prays that the said George F. Martin and Adolph Krupnick be made parties defendant to said cause.

“ ‘Defendant states that frequently since the occurrence of said loss it has offered to pay to said plaintiffs \$3,000 of said policy, provided the said plaintiffs transfer to defendant the said promissory notes secured by deeds of trust set out in the said petition, but that plaintiffs have declined and refused to transfer said promissory notes secured by said deeds of trust, or to subrogate defendant to the rights of plaintiffs in said property.’ (The offer of \$3,000 is under the erroneous supposition that the \$3,100 also covered the outbuildings.)

“ ‘Admitting that it has not paid the policy but denying that its refusal was vexatious or for delay, defendant tenders into the court the premium received and the interest thereon.

“ ‘Plaintiffs’ reply was a general denial. Thereafter the court ordered that Martin and Krupnick be made parties defendant, each of whom filed a pleading by way of answer and reply. Krupnick averred that he had been the owner of said property since September 13, 1913, subject to the deeds of trust, averred that appel-

lant, American Central Insurance Company, at all times had full knowledge of said fact, and denied that it was entitled to subrogation.

"The answer of Martin was substantially to the same effect, except that he disclaimed any beneficial interest in the property, and stated that the deeds conveying the premises were made to him for the purpose of having the property conveyed to Krupnick.

"By way of reply to these pleadings, appellant specifically denied that it had any knowledge that Krupnick was owner, and of any conveyance from Martin to Krupnick, and averred that it first learned of these facts long after the occurrence of the fire, and that it has tendered into court the amount of the premium with interest.

"The first and second deeds of trust were executed September 12, 1913. The Night and Day Bank of St. Louis had prior thereto owned the insured property, referred to as the Princeton Avenue or Richmond Heights property. Adolph Krupnick, prior to that date, owned improved real estate on Dickson Street in St. Louis, also incumbered. With the aid of one Altheimer, a real estate agent, the bank (which carried the Richmond Heights property in the name of Arthus O. Meininger), on September 12, 1913, traded the Richmond Heights property to Adolph Krupnick, for his interest in the Dickson Street property, Altheimer acting as agent for both parties. Krupnick at the time had some children by his former wife, since deceased, and for family reasons did not want to have his name of record as the owner of the real estate. Accordingly, Meininger, acting for the bank, made a deed conveying the Richmond Heights property to George F. Martin, a collector in the employ of Altheimer, Martin and his wife, contemporaneously therewith, executing the first and second deeds of trust upon the property, to secure notes payable to the order of Meininger. On the next day Martin and his wife executed a deed conveying the fee-simple title in and to the Richmond Heights property, subject to the deeds of trust, to Adolph

Krupnick, and it was agreed between Altheimer and Krupnick that this deed would remain unrecorded in the possession of Altheimer until such time as Krupnick called for it.

"There is no record evidence that either of plaintiffs knew that Martin had made the conveyance to Krupnick, or knew of the agreement between Altheimer and Krupnick that any deed should remain unrecorded. Nor was there any written application for the policy, the request for its issue having been made over the telephone to the defendant's city office. It should also be noted that while defendant claims that the policy covered only \$3,000 on the house, and that the \$100 was on the out-buildings, etc., the policy itself calls for '\$3,100 on the two-story, shingle-roof frame building and additions thereto,' after which appears this: 'Nil on fencing, stable and outhouses belonging to above-described building.' These were not injured or destroyed.

"The first deed of trust was to secure a promissory note for \$2,500 and interest notes in the sum of \$75, one due every six months, until maturity of the principal note, which was due five years after date, or September 12, 1918.

"The second deed of trust, executed the same day, to-wit, September 12, 1913, was to secure the sum of \$875 purchase money, evidenced by fifty-eight promissory notes of \$15 each, payable in from one to fifty-seven months after date, and one note payable fifty-eight months after date for \$20.

"At the time of the fire these deeds of trust remained unpaid; and at the time of the trial there was still due on the first mortgage \$2,500, and on the second mortgage \$875, making a total of \$3,375. The policy was issued January 21, 1914, for a premium of \$46.50, insuring George F. Martin for the term of three years, from the 20th day of January, 1914, in the sum of \$3,100, on the dwelling house in question. It is the New York standard policy, and contains provisions render-

ing it void in case of concealment or misrepresentation of any material fact or circumstance concerning the insurance or subject thereof, or if the interest of the insured be not truly stated, or if the interest of the insured be other than unconditional and sole ownership, or if the subject of insurance be a building on ground not owned by the insured in fee simple. The policy bears a mortgage clause providing that it is payable, in case of loss, to C. E. Hayden, mortgagee or trustee, as in the mortgage clause provided, which clause also contains the provision, among others, that the interest of the mortgagee or trustee shall not be invalidated by any act or neglect of the mortgagor or owner, etc.; provided, among other things, that the mortgagee or trustee shall notify the company 'of any change of ownership, or increase of hazard which shall come to his or their knowledge, and shall have permission for such a change of ownership or increase of hazard, duly indorsed on the policy,' and further providing, that if the company 'shall pay the mortgagee or trustee, any sum for loss under this policy, and shall claim that as to the mortgagor or owner, no liability therefor existed, it shall at once and to the extent of such payment, be legally subrogated to all the rights of the party to whom such payment shall be made, under any and all securities held by such party for the payment of said debt.'

"The policy was applied for by the mortgagee, Arthur O. Meininger, and issued by the N. R. Wall & E. T. Campbell Agency Company, representing the appellant. Meininger, in making application for the policy, gave the name of George F. Martin as the owner of the property, and did not disclose the interest of Krupnick in the property. Meininger had been acquainted with Krupnick for a considerable time prior to making application for the policy, and Krupnick had told him before he applied for the policy that he owned the Princeton Avenue property. About February 11 or 12, 1914, the Wall-Campbell Agency Company made a request for an inspection of the physical condition of this prop-

erty, and the inspection slip, or paper used for that purpose, was turned over to one Brown, who had been in the employ of the American Central Insurance Company for many years, whose authority was then limited to an inspection of the property and to the incidental duty, as appellant claims, of reporting any facts he might learn regarding the ownership or hazard incident thereto. The inspection slip set out that the assured was George F. Martin; and under the head of 'Occupancy,' Brown filled in the words, 'Dwl. of owner,' along with some other notations as to the physical condition of the property, signed his name to it, and turned it in to the Wall-Campbell Agency Company.

"The fire occurred November 6, 1914, and a few weeks after the fire, one Olson, in the employ of the Western Adjustment & Inspection Company, insurance adjusters, who had been requested to adjust a loss sustained by Krupnick as to certain furniture, under a policy issued by some other company than appellant, took the furniture loss up with Krupnick and adjusted it, and in that connection was told by Krupnick that he owned the house. Neither Olson nor his employer had at that time been employed by the appellant herein to do any adjusting with reference to the policy in suit. Subsequently, however, when that Inspection Company was employed by appellant, Olson, learning shortly after the fire, that a claim was being made for the insurance by the holder of a deed of trust, took the matter up with Mr. Altheimer and inquired of him who George F. Martin was. Altheimer informed him that he was the third party in this transaction; that the policy had not been transferred nor the deed recorded, but that Mr. Krupnick was the owner. Olson then went to Clayton and examined the records of the Recorder of Deeds and reported to appellant. What he reported does not clearly appear, but presumably that Krupnick was owner of the property—at least he, acting as adjuster for appellant, knew that. This was a few weeks after the fire.

"There is practically no controversy as to the facts in this case except with reference to the contention made by attorneys for Krupnick, that at the time the inspector, Brown, visited the dwelling, about February 11 or 12, 1914, after the policy was issued, which was on January 21, 1914, he knew that Krupnick lived there, greeted him by his name, and on that occasion was informed by Krupnick that he owned the property. Krupnick testified that, when Brown came to the house, he inquired, 'Does Mr. Krupnick live here?' and was informed by Krupnick that he did. Krupnick was corroborated in this by some of his children who were present. Brown denies that he had such knowledge or conversation.

"The case was called for trial on the 24th day of April, 1916, and over the protest of appellant the court directed that the issues between it and the respondents Meininger and Hayden be tried before a jury, excluding from said trial the other defendants, Martin and Krupnick; and at the end of that trial the court directed the jury to find a verdict in favor of said respondent, submitting, however, the question of vexatious delay.

"Thereafter, on the 1st day of May, 1916, the verdict of the jury in the first named trial having been received and filed by the court, the court proceeded to try the issues between appellant and defendants Martin and Krupnick, over the protest of appellant, before a jury in exactly the same manner, and, as before, at law. At the conclusion of this trial, the court submitted to the jury the issue raised by defendants Martin and Krupnick, that the policy, though invalid because of Martin's lack of ownership at the time of the issuance of the policy, unless said provision was waived, was binding and valid if the jury found that Brown, while making inspection, was told by Krupnick that he was the owner, and that Brown made no objection nor suggestion to Krupnick that such fact would invalidate the policy, and that the appellant thereafter retained the premium and did not cancel the policy; that the appellant

would be deemed to have thereby waived the provision of the policy relating to title to the property, and that, in that event, the jury should return a verdict that the policy was valid as to both Martin and Krupnick. Verdict was rendered to the effect that the jury found the issues for Martin and Krupnick and that the policy was valid' as to them.

"Motions for new trial having been duly filed by appellant, after both these verdicts, the court overruled them and entered judgment upon said verdicts, that is to say, upon the first verdict in favor of plaintiffs for the amount of the policy, plus \$250 attorneys' fees; and upon the second verdict, that the policy sued upon was valid as to Martin and Krupnick. Motions for new trial and in arrest of judgment were thereafter filed by appellant, and these motions being overruled, it prosecuted its appeal to this court."

The amended answer and cross-bill filed by relator, which it is claimed converted the law action supra into one in equity, in substance, reads as follows:

(1) It admits that on September 12, 1913, the real estate described in the petition was improved with a certain dwelling known as 1725 Princeton Avenue, in Richmond Heights; admits that on the date above mentioned, said George F. Martin, executed and delivered to plaintiff Hayden, as trustee, for the benefit of plaintiff Meininger, the deeds of trust described in plaintiff's petition; admits, that on January 21, 1914, at the time when said deeds of trust were in full force and effect, defendant, in consideration of the premium of \$46.50 then and there paid to it, issued the policy sued on against fire, for a term of three years, ending on January 20, 1917, and that a rider or clause attached, provided that any loss which may accrue under said policy, should be payable to C. E. Hayden, trustee; that on November 6, 1914, while said policy was in force, the building aforesaid was destroyed by fire.

Every other allegation in the petition is denied.

(2) Further answering, defendant states, that by the terms of said policy, it was agreed that said entire policy, unless otherwise provided by agreement indorsed thereon, or added thereto, should be void if the interest of said insured, George F. Martin, in said property, be other than an unconditional and sole ownership, or if the building be on ground not owned by said insured in fee simple, or if any change, other than death of the said insured, take place in the interest, title or possession of the said property, whether by voluntary act of the insured or otherwise.

(3) Defendant further alleges, that on September 12, 1913, Arthur O. Meininger, one of the plaintiffs herein, executed and delivered to one George F. Martin, a deed in fee simple to lot 9 of Block 9, of Richmond Heights, being the property upon which the building covered by said policy was situated, and described in the petition; that on or about said date, said George F. Martin joined therein by his wife, executed and delivered to C. E. Hayden, plaintiff herein, the certain first and second deeds of trust, described in the petition; that thereafter on or about September 13, 1913, said George F. Martin, executed and delivered to one Adolph Krupnick an absolute deed to said real estate; that when said policy was issued, on or about January 21, 1914, said Krupnick, through said conveyance from Martin, was the absolute owner of said real estate, subject to the deeds of trust aforesaid; that said ownership and title were not known to defendant.

(4) That by the terms of said policy, it was agreed that if, with the consent of defendant, interest under said policy should exist in favor of the mortgagee, the conditions contained in said policy should apply in the manner expressed in such provision and conditions of insurance relating to such interest, as shall be written upon, attached or appended thereto; that the said George F. Martin and said C. E. Hayden and said Mein-

inger, concealed from defendant at the time application was made for the policy of insurance sued upon by plaintiffs, the title and interest of said Krupnick in said property; that his said title and interest therein were not made known to defendant, or insured, or mentioned in said policy; that by reason of said facts said policy was rendered null and void and of no effect at the time of said fire. Wherefore, having fully answered, defendant prays that it be hence discharged with its costs.

The foregoing parts of said amended answer, designated by way of convenience, as paragraphs 1, 2, 3 and 4, simply presented issues of law and fact for the consideration of a jury, *without any equitable matter being presented as a defense or otherwise*. The remaining portion of said amended answer, alleged to be a cross-bill demanding equitable relief, etc., in substance, reads as follows:

(5) Defendant states that said policy provided that \$3,000 was the amount taken on said dwelling and \$100 on the fences, stable and outhouses situated on said premises; that none of the fences, stable or outhouses, covered by said policy, were damaged by fire.

(6) This paragraph is the same as that marked (2) *supra*, and then continues: that if, with the consent of defendant, interest under said policy shall exist in favor of a mortgagee, or of any person having an interest in the subject-matter of said insurance, other than the interest of the insured described therein, the conditions contained in said policy shall apply in the manner expressed in such provisions and conditions of insurance, relating to such interest, as shall be written upon, attached or appended thereto.

(7) Defendant further states that it is provided in the rider attached to said policy, as follows:

"It is also agreed that whenever this company shall pay to the mortgagee or trustee any sum for loss under this policy and shall claim that as to the mortgagor or owner, no liability therefor existed, it shall at once and

to the extent of such payment, be legally subrogated to all the rights of the party to whom such payment shall be made, under any and all securities held by such party for the payment of said debt. But such subrogation shall be in subrogation to the claims of said party for the balance of the debt so secured. Or this company may at its option, pay the said mortgage or trustee, the whole debt so secured, with all the interest which may have accrued thereon to the date of such payment, and shall thereupon receive from the party to whom such payment shall be made an assignment and transfer of said debt with all securities held by said party for the payment thereof."

(8) Further answering, the same facts are alleged as are set out in paragraph (2) supra.

(9) Defendant further states the same facts as are heretofore set out in paragraph (3).

(10) Defendant further states the same facts as are set out in paragraph (4) supra; that said policy was not in full force on November 6, 1914, as to said George F. Martin, when said property is alleged to have been destroyed or damaged by fire.

(11) Defendant further states that, by reason of said Krupnick's ownership of said property, said policy became null and void; that defendant is not liable to said George F. Martin, or to said Adolph Krupnick; that if said plaintiffs, as trustee or mortgagee, at the date of said loss or damage, had any interest in said property, and have any right to insurance under said policy, defendant claims its right to pay to said trustee, the amount, if any, due under the terms of said policy, payable on account of said loss and damage, and to be subrogated to the interest of the said mortgagee in the deeds of trust described in plaintiffs' petition.

(12) Defendant further states that said George F. Martin and Adolph Krupnick are necessary parties, and are interested in the subject-matter of this case; that a complete determination of this action cannot be had

without the presence of both of said persons, in that the defendant herein claims the right to be subrogated to the rights of plaintiff, Arthur Meininger, in and to the securities held by him constituting a first and second lien, as stated in this answer, on the real estate, the legal title to which is in said George F. Martin, and the equitable title of which is in said Adolph Krupnick. The defendant, therefore, prayed that said Martin and Krupnick be made defendants in the cause.

(13) Defendant states that frequently, since the occurrence of said loss, defendant offered to pay said plaintiffs \$3,000 of said policy, provided said plaintiffs transfer to defendants the said promissory notes secured by deeds of trust, set out in petition, but that plaintiffs have declined and refused to transfer said notes or to subrogate defendant to the rights of plaintiffs in said property.

(14) Defendant admits that it has not paid said policy, but denies that defendant's refusal to pay the same has been vexatious or for delay.

(15) Defendant further states that the premium, amounting to \$46.50 for said policy, was paid to it February 6, 1914, and defendant hereby tenders to said George F. Martin, Adolph Krupnick and the plaintiffs herein, and now brings into court and deposits the same with the clerk thereto, the sum of \$46.50, with interest thereon from February 6, 1914, amounting to \$5.73, making a total of \$52.23.

(16) Said answer and cross-bill then concludes with a prayer that judgment be entered in defendant's favor and against plaintiffs. It further prays that if the court should find in favor of plaintiffs, it order and direct them to transfer to defendant the said notes and deed of trust set out in petition, and for a decree to the effect that defendant should stand subrogated to all and singular the rights of said mortgagee as holder of said mortgage lien, and for such other and further orders and decrees as in the premises may be just and proper.

Relator, in due time, filed a motion for re-hearing in the Court of Appeals, in above entitled cause, which was overruled and the present writ applied for by the defendant to quash the record and judgment of said court.

I. Relator's first assignment of error, reads as follows:

“In holding that this cause was properly tried as at law and that it should not be tried as in equity, the decision of the court is in conflict with the previous controlling decisions of this court holding that where a cross-bill presents not only an equitable defense, but seeks affirmative relief which a court of equity alone has power to give, the cause is triable as a cause in equity.” In support of that contention, *Carter v. Metropolitan Life Ins. Co.*, 275 Mo. 84, l. c. 94; *Myers v. Schuchmann*, 182 Mo. 159, l. c. 171, and *Wendover v. Baker*, 121 Mo. 273, l. c. 289, are cited.

In passing upon relator's contention, and the authorities cited in support of same, it is important that we should keep in mind the issues presented by the pleadings in the case.

Hayden as trustee, and Meininger as *cestui que trust*, sued upon the policy in controversy as mortgagees, under the rider attached to said policy, to recover \$3,100. The alleged equitable matters set up in defendant's amended answer simply related to the subject of subrogation, on the theory that defendant had the right to pay off the demand of plaintiffs and take an assignment from them, etc. The equity relied on by defendant *did not purport to destroy plaintiffs' legal action on the policy as their interests might appear*. On the contrary, relator was defending on the merits at law, and if this defense proved *unavailing*, it desired relief in equity, by being subrogated to plaintiff's rights in the premises, on the theory that it had paid their demand. On the record thus presented, we are decidedly of the opinion that the Court of Appeals

was within the law, in holding relator's amended answer aforesaid did not convert plaintiffs' case into a proceeding in equity.

In *Colburn v. Krenning*, 220 S. W. (Mo.) l. c. 937, we had occasion to consider this question very carefully, where an alleged cross-bill in equity was filed, presenting substantially the same kind of a question as that now under consideration. We there gave expression to our views in the following language:

"It may be conceded in passing, that where plaintiff is asserting an action at law, if the defendant, in his answer, pleads matters of an equitable nature, and asks for affirmative equitable relief, *which, if taken to be true, would destroy plaintiff's case*, or show that he never had a valid cause of action, the whole case would be converted into a proceeding in equity. Under such circumstances, it is generally held that the equitable answer thus filed converts the entire action into a proceeding in equity to be tried by the court.

"Upon a careful consideration of the authorities, we have not been able to find any case going to the extent of holding that an answer like the one before us could deprive a plaintiff of his constitutional right of trial by jury." (*Italics ours.*)

The same principle is announced in the following cases: *Fulton v. Fisher*, 239 Mo. l. c. 131; *Lincoln Trust Co. v. Nathan*, 175 Mo. l. c. 42, 74 S. W. l. c. 1008; *Mathiason v. St. Louis*, 156 Mo. l. c. 200; *Joyce v. Growney*, 154 Mo. 253.

Turning to the three cases relied upon by relator under this proposition, we find that neither is in conflict with the law as heretofore declared. In *Carter v. Insurance Co.*, 275 Mo. 84, and following, plaintiff sued on a life insurance policy. The answer set up an equitable defense, alleging that the policy was obtained through fraud, etc., and the court was asked to *cancel* the same. The equitable defense thus pleaded, *destroyed plaintiff's right to recover on the policy* and, hence, un-

der the rule heretofore announced, converted the whole case into a proceeding in equity. In *Myers v. Schuchmann*, 182 Mo. 159, relied upon by relator and cited in the Carter Case, plaintiff sued in ejectment. The answer alleged that the deed from Balch to plaintiff was made through mistake and in fraud of the rights of defendants, etc. It concluded with a prayer to cancel said deed, etc. The equitable relief sought in the answer *destroyed plaintiff's case*. Under the circumstances, the trial court properly disposed of it as a proceeding in equity. In *Wendover v. Baker*, 121 Mo. l. c. 274, and following, relied on by relator and cited in the Carter case, the plaintiff sued on three promissory notes. Defendant, in his answer, set up an agreement by which said notes were to be cancelled, alleged that he had complied with his part of said agreement, and concluded the answer with a prayer, that plaintiff be restrained from prosecuting her action at law, and that said notes be cancelled, and surrendered to him. The facts stated in said answer, if true, destroyed plaintiff's right of recovery on said notes, and entitled him to the equitable relief prayed for. The entire case was, therefore, converted into a proceeding in equity, and should have been disposed of by the trial court accordingly.

The foregoing contention of relator is without merit.

(a) There was no equity in said answer so far as plaintiffs were concerned, for the obvious reason, *that defendant never paid the amount of their demand*. If it insisted on being subrogated to plaintiffs' rights, it should have paid the latter's demand, or paid the same into court, and asked for an order subrogating it to plaintiffs' rights, etc. Even without an order of court, or the formal assignment of securities held by plaintiffs, the payment of plaintiffs' demand, would have entitled relator to equitable subrogation. [25 Ruling Case Law, sec. 8, p. 1320.] The above subrogation, however, had nothing whatever to do with plaintiffs' right to recover on the policy as mortgagees.

(b) The trial court erred in requiring Martin and Krupnick to appear and plead in plaintiffs' case, as they were not only unnecessary parties therein, but had no interest in the controversy pending between relator and plaintiffs. [Fulton v. Fisher, 239 Mo. l. c. 131-2.]

Unnecessary
Parties,

Concealment:
Knowledge of
Defendant.

II. Although the trial court improperly required Martin and Krupnick to be joined as parties to plaintiffs' action, yet they appeared and plead therein. Martin disclaimed any beneficial interest, and answered that the premises were conveyed to him for the purpose of having said property conveyed to Krupnick. The latter pleaded to said action, after having been brought in at the instance of relator, and alleged, in substance, that he was the owner of the real estate in controversy, subject to said deeds of trust; that said insurance company had full knowledge, at the time it wrote the policy, of all the facts stated in said pleading; that it had full knowledge before and after said policy was written, of all the facts aforesaid, and, with this knowledge, kept and retained the amount of premium paid for said insurance; that by reason of the foregoing, said insurance was not void, etc. The relator pleaded to said answer, and denied that it had any knowledge of the above facts pleaded by Krupnick.

It will thus be seen that the issues between Krupnick and relator were purely *legal* in their nature, and properly triable before a jury. The *equitable* matter set out in the cross-bill, *did not purport to destroy Krupnick's right of action*, but was pleaded as *subrogation*, without paying plaintiffs' demand as heretofore shown. The authorities cited in the preceding proposition apply with equal force to the above facts. The case was, therefore, properly tried throughout as an action at law, and the Court of Appeals was right in so holding.

III. Relator's second assignment of error, reads as follows:

“The decision of the Court of Appeals that the relator is charged with whatever knowledge was acquired a few weeks after the issuance of policy, by its inspector Brown, though such knowledge, if any, was not shown to have been communicated by Brown to any superior agent or officer of the relator, is in conflict with the previous controlling decision of this court in the case of *James v. Mutual Life Insurance Company*, 148 Mo. 1, l. c. 11, in that said Brown was not shown to have received such authority from the relator as would constitute him the agent of relator with power to bind the relator by his acts and knowledge as if under the circumstances the relator had acted for itself.”

The *James Case*, *supra*, came to this court on appeal from the circuit court, and all the evidence was before us. Upon page 13 of the *James Case*, it was said: “The question of waiver is, like any other fact in the case, essentially a matter for the jury.”

The entire evidence was presumably before the Court of Appeals, but only such portions of same can be considered here as appear from the opinion of the Court of Appeals. [*State ex rel. Bush v. Sturgis*, 221 S. W. (Mo.) 91.] On the partial facts before us, we find no grounds for quashing the record and judgment of the Court of Appeals on account of alleged conflict between its opinion, and that of this court in the *James Case supra*. The above contention is accordingly overruled.

IV. Relator's third assignment of error reads as follows:

“The decision of the Court of Appeals discloses facts conclusively proving that relator at the date of the fire is not liable under said policy to Martin, the mortgagor; and in refusing, as in equity, to consider and enforce subrogation as provided in the mortgage clause, as an incident to a finding of the court that relator is liable to pay the mortgagee under the mortgage clause, the decision is in conflict with the

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previous controlling decisions of this court that a person secondarily liable, who pays the debt of another, is, as against the debtor primarily liable, entitled to be subrogated to all the rights of the creditor under the securities held by him. [Loewenstein v. Queen Insurance Co., 227 Mo. 100, l. c. 117.]”

The main points relating to this assignment of error have been fully considered under propositions one and two of this opinion. We hold that there is no conflict between the conclusions reached by the Court of Appeals in this case, and the principles of law declared in the Loewenstein Case above mentioned.

V. It is undisputed in this case that no part of the loss sustained by plaintiffs has ever been paid. The relator was not entitled to be subrogated to the rights and remedies of plaintiffs until it had paid their demand. The alleged equitable defense injected into the cause did not convert the case into a proceeding in equity. On the contrary, it was properly disposed of as a proceeding at law. Under the circumstances, there was no place for equitable subrogation in the case. The opinion of the Court of Appeals is in harmony with the former rulings of this court.

The writ heretofore issued is accordingly quashed. *Mozley and White, CC.*; concur.

PER CURIAM:—The foregoing opinion of RAILEY, C., is hereby adopted as the opinion of the court. All of the judges concur.

MATILDA S. SMITH, Appellant, v. THOMAS R. SMITH, et al.

Division Two, July 19, 1921.

1. **CANCELLATION OF DEED: Undue Influence: Parent and Son: Burden of Proof.** The simple relation of parent and child is not sufficient to justify the cancellation of a deed or lease from the

parent to the son, but in order to authorize such cancellation there must be a further showing of the exercise of undue influence by the son, or the existence of fraud practiced upon the parent by him, or that some advantage was taken by the son of the parent's weak condition of mind; and where there is no evidence tending to show any relation of trust and confidence between the parent and son except that which exists between parent and child, the burden of showing fair dealing and the absence of undue influence does not shift to the son in her suit to set aside a conveyance of her farm to him.

2. ———: ———: ———: **Utmost Fairness.** Where the evidence shows that the utmost fairness characterized the dealings of a son with his mother and manifests a desire on his part to secure to her an adequate income from her farm, which she, because of old age and physical infirmities, was unable to operate, and to preserve the estate intact for himself and her other children, and further shows that, in pursuance to said desire, he took upon himself a burden that he alone of all her children was able to carry, which required the advancement of considerable sums of money and his personal attention for ten years or more before he could be reimbursed, there is no room for the contention that, in her suit to set aside the conveyance, the burden of showing fair dealing and the absence of undue influence shifted to him.
3. **CONVEYANCE: Incapacity of Grantor: Expert Testimony: Exploded by Her Own.** In a suit to cancel a deed and lease made by a mother to her son, testimony of the mother at the trial, eight months after the instruments were executed, in which she clearly relates the conversations and agreement between herself and the son at and prior to their execution, is of itself sufficient to explode the testimony of medical experts to the effect that at the time the instruments were executed she was of unsound mind and incapable of entering into such contractual relations.
4. ———: **To Several Children: Acceptance by All.** Where the mother did not write in her deed to her children, intended as an advancement to each of them, that it should be void unless all of them accepted it, the law will not imply a condition of defeasance in case one or more of them fail to accept it; but as to the grantee to whom it was delivered and as to those who do accept it, it will be a valid conveyance, and as to those only who refuse to accept it will it be held void.
5. ———: ———: **Lease: Ratification.** Where a voluntary deed to a farm by a mother to her children was made subject to a contemporaneous lease to one of them for ten years at an annual rental, her demand and acceptance of a part of the rental is an affirmance

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of the contract with said grantee and lessee, subject to the correction of mutual mistakes, and cannot be avoided as to him because four of the six children refused to accept the deed.

6. **DEED: Lease: Mutual Mistakes: Reformation.** Where the agreement between a mother and her son was that her farm should be leased to the son for ten years at a named annual rental, and in addition he was to pay the taxes and make needed improvements on the dilapidated farm and pay the interest on two existing mortgages and advance her whatever sum above the rental was necessary for her comfort, and he was to be reimbursed for all said outlay above the annual rental by an extension of said lease at the same rental for such a time as would reimburse him, and that a deed should be made to all her children as equal grantees, subject to said lease, and said agreements were not incorporated in either of said contemporaneous instruments, and the son, in his answer to the mother's suit to have the deed and lease cancelled, asserts that such were the agreements and prays that the instruments be reformed to include them, the court should reform the deed so to make it subject to the lease and the mother's life estate, and reform the lease so as to extend it for such period as will meet the other terms of the agreement.

Appeal from Lincoln Circuit Court.—*Hon. Edgar B. Woolfolk*, Judge.

REVERSED AND REMANDED. (*with directions*).

Sutton & Huston for appellant.

(1) (a) The execution of the lease and deed was the result of undue influence. There existed between plaintiff and defendant, at the time of the execution of the instruments sought to be set aside, a confidential or fiduciary relation, which relation alone raised a presumption of undue influence and devolved upon defendant the burden of showing that the plaintiff was of sound mind, capable of making the deed and lease, and that the instruments in question were made by plaintiff as her free act, uninfluenced by any improper conduct upon the part of defendant, and of showing by clear and convincing proof that he acted with perfect good faith and did not abuse or betray the confidence reposed in him, and of

showing that all was fair, open, voluntary and well understood. McClure v. Lewis, 72 Mo. 320; Youtsey v. Hollingsworth, 178 S. W. (Mo.) 107; McKissock v. Groom, 148 Mo. 467; Jones v. Belshe, 238 Mo. 539; Jones v. Thomas, 218 Mo. 536; Cornet v. Cornet, 248 Mo. 234; Wing v. Havelik, 253 Mo. 508; Martin v. Upson, 189 Mo. App. 636; Naylor v. McRuer, 248 Mo. 459; Roberts v. Bartlett, 190 Mo. 700; Grundmann v. Wilde, 255 Mo. 115; Wendling v. Bowden, 252 Mo. 687; Stahl v. Stahl, 214 Ill. 131; Horner v. Bell, 102 Md. 535; Stepp v. Frampton, 179 Pa. 284. (b) The relation of parent and child is a confidential one, and should be taken into consideration upon the issue of undue influence, and when to this relation is added evidence of actual confidence and trust, as in this case, the burden of showing fair dealing and the absence of undue influence is shifted to the defendant. Youtsey v. Hollingsworth, 178 S. W. (Mo.) 107; Jones v. Belshe, 238 Mo. 539; McClure v. Lewis, 72 Mo. 314; Ennis v. Burnham, 159 Mo. 494; Jones v. Thomas, 218 Mo. 536; Wendling v. Bowden, 252 Mo. 687; Stahl v. Stahl, 214 Ill. 131; Horner v. Bell, 103 Md. 535; Stepp v. Frampton, 179 Pa. 284; Ryan v. Ryan, 174 Mo. 286. (c) The rule that the existence of a confidential relation between the contracting parties raises the presumption of undue influence, is not confined to technical fiduciary relations, such as parent and child, guardian and ward, trustee and *cestui que trust*, principal and agent, but its application extends to all those informal relations in which confidence is reposed or which exist whenever one person trusts in or relies upon another. Stahl v. Stahl, 214 Ill. 131; Horner v. Bell, 102 Md. 135; Stepp v. Frampton, 179 Pa. 284; Ryan v. Ryan, 174 Mo. 286; Jones v. Thomas, 218 Mo. 536; Jones v. Belshe, 238 Mo. 539; Cornet v. Cornet, 248 Mo. 234. (d) Whether the evidence of mental incapacity considered by itself and disconnected with the question of undue influence is sufficient to justify the cancellation of the instruments executed by the plaintiff on that ground or otherwise, yet

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such incapacity is so interwoven with the question of undue influence as to make it a factor in the case until the controversy as to undue influence is settled. *Grundmann v. Wilde*, 255 Mo. 115; *McKissock v. Groom*, 148 Mo. 567; *Jones v. Belshe*, 238 Mo. 539. (e) Defendant's answer admits that plaintiff at the time of the execution of the instruments sought to be set aside, was "in an aged and feeble condition of mind and body, and without business experience and incapable of resisting the influence of those who might have sinister and selfish aims against her property, and who might seek to defraud her of the same." This, without more, casts the burden upon defendant to show the absence of undue influence and fraud in the procurement of the execution of these instruments. *Holser v. Beard*, 54 Ohio St. 398. (2) If a grantor has not capacity equal to a full and clear understanding and comprehension of the nature and consequences of the act, the conveyance is invalid. 22 Cyc. 1170; *McKissock v. Groom*, 148 Mo. 469; *Chadwell v. Reed*, 198 Mo. 379; *Ellis v. McNally*, 177 S. W. (Mo.) 658; *Turner v. Anderson*, 236 Mo. 544-545; *Naylor v. McRuer*, 248 Mo. 562. (3) In the case of mutual mistake in the making of a contract, equity will reform the instrument. In case of unilateral mistake, equity will cancel or set aside the contract. This is the universal rule where a relation of trust or confidence exists between the parties, or the parties were not dealing at arm's length, or where any fraud was practiced in the procurement of the execution of the contract. *Albany City, etc. v. Burdick*, 87 N. Y. 46; *Story v. Cammel*, 94 N. W. 982; *Ward v. Speltz*, 39 Neb. 809; *Hamilton v. Carpenter*, 64 N. E. (Ind.) 939; *Loyd v. Phillips*, 101 N. W. (Wis.) 1092; *Cherry v. Brezzolan*, 89 Ark. 315; *Moffett & Co. v. Rochester*, 178 U. S. 385; *Keene v. Demelman*, 172 Mass. 222-3; *Nelson v. Carlson*, 54 Minn. 90; *Crowe v. Lewin*, 95 N. Y. 423; *Deman v. Providence & C. Railroad*, 5 R. I. 130; *Brown v. Lampluar*, 35 Vt. 252. (4) Four of the grantees in the deed declined acceptance of the

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deed, and the deed not having been accepted by all of the grantees becomes void as to all, and this situation vitiates the entire transaction. *McNear v. Williams*, 166 Mo. 358. (a) Delivery and acceptance of a deed are essential requisites to cause it to operate as a complete and effectual conveyance. *Hall v. Hall*, 107 Mo. App. 101; *Wells v. Hobson*, 91 Mo. App. 379; *Pullis v. Somerville*, 218 Mo. 624; *Seibel v. Higham*, 216 Mo. 121; *McNear v. Williams*, 166 Mo. 358; *Rogers v. Carey*, 47 Mo. 232. (b) There can be no delivery without the consent of the grantee. *Turner v. Carpenter*, 83 Mo. 333; *Schooler v. Schooler*, 258 Mo. 83. (c) There can be no delivery of a deed without acceptance of the grantee. *Miller v. McCaleb*, 208 Mo. 562; *McNear v. Williams*, 166 Mo. 358; *Cravens v. Rassiter*, 116 Mo. 338; *Schooler v. Schooler*, 258 Mo. 83. (d) No title passes until the deed is accepted by the grantee. *Cravens v. Rassiter*, 116 Mo. 338; *Rogers v. Carey*, 47 Mo. 232, 236. (e) The filing of a deed made to an adult grantee for record and the recording of the same unauthorized by the grantee, does not constitute a delivery or acceptance. *Miller v. McCaleb*, 208 Mo. 562; *Cravens v. Rassiter*, 116 Mo. 338; *Allen v. Degroodt*, 105 Mo. 442; *Rogers v. Carey*, 47 Mo. 232. (f) The filing for record of a deed raises a rebuttable presumption of acceptance by the grantee. *McLean v. Goodwillie*, 204 Mo. 306; *Miller v. McCaleb*, 208 Mo. 562; *Peters v. Berkemeier*, 184 Mo. 393; *Whittaker v. Whittaker*, 175 Mo. 1; *Chambers v. Chambers*, 227 Mo. 262.

Creech & Penn for respondents.

(1) When Mrs. Smith caused, or permitted the deed to her lands to be recorded, conveying her property to her children, there was a presumption of delivery, which can only be overcome by evidence adduced by plaintiff, which removes all reasonable doubt that the grantor thereby intended to deliver the deed. *Hall v. Hall*, 107 Mo. 108; *Burkey v. Burkey*, 175 S. W.

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624; Chambers v. Chambers, 227 Mo. 284; Tobin v. Bass, 85 Mo. 658; Standiford v. Standiford, 97 Mo. 239; Sneathen v. Sneathen, 104 Mo. 210; Devey v. Fielder, 216 Mo. 192. Acceptance of a deed may be proved by direct or circumstantial evidence, and the presumption of acceptance is stronger where the deed is voluntary, than where there is a sale of the land. Burkey v. Burkey, 175 S. W. 624; Schooler v. Schooler, 258 Mo. 921, 167 S. W. 444; Chambers v. Chambers, 227 Mo. 284. (2) The assumption that Tom Smith bore a confidential or fiduciary relation to his mother, from which undue influence might be presumed, merely because he was her son, and the natural esteem and affection which should characterize the relation existing between mother and son, unaffected by any other relationship, cannot be maintained by reason or on authority. McKinney v. Hensley, 74 Mo. 332; Hamilton v. Armstrong, 120 Mo. 615; Maddox v. Maddox, 114 Mo. 46; Doherty v. Noble, 138 Mo. 32; Bousall v. Randall, 192 Mo. 531; Huffmann v. Huffmann, 117 S. W. 3, 217 Mo. 182; Stanfield v. Hennegar, 259 Mo. 51; Beanland v. Bradley, 2 Smale & G. 339; Mackall v. Mackall, 135 U. S. 167; Jones v. Thomas, 218 Mo. 508; McLeod v. McLeod, 145 Ala. 269; Francis v. Wilkinson, 147 Ill. 370; McCord v. McCord, 136 Iowa, 53; Cooper v. Moore, 55 Misc. 102; Teter v. Teter, 59 W. Va. 449; Wessell v. Rathjohn, 89 N. C. 377; Townson v. Moore, 173 U. S. 17; Prescott v. Johnson, 91 Minn. 273; Rader v. Rader, 108 Minn. 139; Stanfield v. Johnson, 159 Ala. 546; Sears v. Vaughan, 230 Ill. 572. The deed and lease contemporaneously executed are part and parcel of one transaction and should be read together as one instrument, and when so read makes it clear that a life tenancy was reversed in the lands to Mrs. Smith. Cook v. Newly, 213 Mo. 471. (3) When there is a mutual mistake in the execution of an instrument or instruments, in that the written instrument does not express the contract which the parties actually entered into, whether the mistake be of law or fact, equity will re-

form the contract, and this, too, whether the proceeding to reform be by way of a bill to correct a mistake, or by way of an answer as a defense asking affirmative relief. *Corrigan v. Tiernay*, 100 Mo. 280; *Williamson v. Brown*, 195 Mo. 332. (4) The mental incapacity of Mrs. Smith to comprehend and understand the nature of the transaction entered into by her and her son, Tom, is not alleged in plaintiff's petition as a ground for setting aside the deed and lease, but is alleged only as an incident to the susceptibility of Mrs. Smith to undue influence, and the evidence as to her mental incapacity to execute the deed and lease, not being within the pleadings, should be ignored by the court.

HIGBEE, P. J.—Plaintiff brought this suit September 9, 1916, to cancel a lease which she had executed August 24, 1916, of her farm of 217 acres in Lincoln County, Missouri, to her oldest son, Thomas R. Smith, and a deed of the same date conveying said farm to her children, Thomas R., Hugh B., George W., Grover C., Edward B. Smith and Josephine S. Williams, subject to said lease and two deeds of trust, one for \$1700 to Zula Thurman, dated July 18, 1913, the other for \$921.50 to her daughter, Josephine S. Brady, now Williams dated August 19, 1914.

The plaintiff's first husband died in 1888. She was the beneficiary in life insurance policies on the life of her husband and another relative in the total sum of \$4500. She lived on and managed the farm indifferently for some years after her husband's death. She later married a man by the name of Luckett, who had a large pack of hounds, built a race track on the farm, exhibited a freak animal at county fairs, squandered nearly all of her insurance money and grossly mistreated her. All of her grown children advised her to divorce him. She did so in 1903 and paid him \$1000 by way of settlement. She had poor health and suffered a paralytic stroke. Her children advised her to remove to St. Louis, where

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Thomas, Josephine, George and Hugh lived. She did this in 1903, after selling off her livestock, farm machinery and household goods, and leased her farm to a Mr. Hughes at an annual rental of \$620, subject to abatement on account of drouths and floods. During the subsequent years to 1915, she did not receive over \$400 per year out of the rents. This was inadequate for her support and payment of taxes, and her medical bills. Some of the time, when able, she kept boarders. The leasing of her farm, then estimated to be worth at least \$15,000, was the subject of many conferences for two or three years between Mrs. Smith, Thomas, and some of her other children. There was a fairly good house on the farm, but the barn, other out-buildings and fences were falling into decay. Owing to its distance, her age, and the impairment of her health and mental faculties, it was believed she was unequal to the task of looking after her property and protecting her interests. After paying the taxes and interest on the mortgages, there was little left to her out of the rents. At that time there was \$1000 arrears of rent due her from Hughes. Thomas insisted that the farm could be rented for \$500 per year, but they failed to secure a tenant who would pay that sum. She talked the matter over with him and Hugh, and probably with some of her other children. Finally, Thomas said he would take a lease on it for ten years at \$500 per year and pay her that sum each year, and that whatever amount it should be necessary for him to pay for permanent improvements to the extent of \$1500, and for taxes and other fixed charges over the said \$500 a year, should be a lien in his favor on the land, and should be taken to extend the term of the lease after his mother's death at \$500 per year for such time as should be covered by any sum he should so advance during her lifetime or for her benefit or upon said property in excess of said \$500 per year. This appeared to be satisfactory to Mrs. Smith and Hugh, and accordingly she and Thomas, on the evening of August 24, 1916, took

the train for Troy, the county seat of Lincoln County, arriving there after midnight. The following morning they called upon Mr. Charles Martin, who had been her attorney for many years, who had secured her divorce in 1903, and attended to the settlement of her first husband's estate and other business matters. They talked the matter over with Mr. Martin, who made memoranda and told them he was busy and for them to go to see the farm and return the next day, which they did. Mr. Martin had written the lease, and his son, Robert, the deed. They were read over, signed and acknowledged by Mrs. Smith. Robert Martin had them recorded and mailed them to Thomas in St. Louis, who showed them to Hugh and to Josephine in her mother's presence. Josephine, who had been a stenographer in a law office for four years, said: "Why, Mamma, you deeded everything away, you haven't got a penny, and Tom is the only one that could give it back." Mrs. Smith was then and had been for some time living with her daughter, Josephine.

The second amended petition charges that plaintiff was, without any means of support except as derived from her land, and was afflicted with physical and mental infirmities due to old age and disease, and was without previous business experience, and wholly incapable of resisting the influence of those about her and particularly of Thomas R. Smith, who was her confidential business adviser and had an irresistible influence over her, and that by reason thereof she was induced against her will to execute the lease and deed which were set out in the petition. That she did not understand the terms and conditions of said instruments, and that they failed to reserve to her a life estate in said land and the rents thereof during her life, but she believed said instruments were so drawn as to reserve to her a life estate in said lands and the rents accruing thereon during her life; that she did not understand that by said lease defendant was permitted to deduct the value of improvements made by

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him from the annual rents, but that she believed that, by the terms of said lease, she should receive \$500 annually in cash without deductions for improvements or any other account, and believed said lease provided that defendant should have the privilege of making permanent improvements not to exceed \$1500, and in case the annual rental of \$500 was insufficient to maintain plaintiff in a suitable manner, then that defendant should advance plaintiff adequate funds for that purpose during her life and in case of such advancements being made to plaintiff or of such improvements being made upon said land by defendant, then that this should operate as an extension of the terms of said lease after plaintiff's death for a period sufficient to reimburse defendant for such advancements and improvements at a rental of \$500 per annum, and that defendant should keep all buildings on the premises insured and pay the premiums thereon, and pay all taxes on the premises as further rental in addition to the \$500 per annum aforesaid, and believed that the children should assume and pay the debts secured by said deeds of trust aforesaid; that plaintiff did not understand that the taxes and insurance on the premises should be taken as credits on the annual rents received; that she was induced to execute the said instruments by the undue influence of the said Thomas amounting to over-persuasion and coercion, and by false representations, pretenses and deception practiced upon her as aforesaid and relied upon by her, and by reason of the fiduciary relation existing between them and her implicit confidence in her said son, and by reason of plaintiff's physical and mental infirmities, and by reason that plaintiff did not understand the nature and purport of said instruments; that said lands were reasonably worth at least \$15,000, and that by their execution she had stripped herself of every vestige of property and means of support; that said deed was never delivered to any defendant other than Thomas R. Smith, and the same was executed and recorded without the knowledge

of, and was never accepted by, said other defendants, but was renounced and rejected by them as soon as they learned of its execution. Wherefore, plaintiff prays that said deed and lease be cancelled and for other proper relief.

Hugh B. Smith filed an answer which was a general denial.

Thomas R. Smith answered, admitting that plaintiff was, on August 24, 1916, owner of said farm and that she was in an aged and feeble condition of mind and body, without business experience, and incapable of resisting the influence of those who might have sinister and selfish aims against her property or who might seek to defraud her of the same; that realizing said fact she had, prior to said date, repeatedly requested him to enter into an agreement with her by which she would be guaranteed from said property an income of \$500 per annum and by which said property would remain intact for her heirs, the defendants in this suit; that \$500 is the full rental value of said property and it was agreed that he would rent it at that sum per year and pay her that sum annually, and whatever sums it should be necessary for him to pay for necessary improvements, not to exceed \$1500, taxes and other fixed charges, should be a lien in his favor on the land, and should be taken to extend the term of his lease after plaintiff's death at \$500 per year for such time as should be covered by any sums he should so advance to plaintiff during her life or for her benefit or upon said property over the said \$500; that said arrangement was entered into by him at his mother's solicitation solely for the purpose of protecting her and her presumptive heirs, against the dissipation of said property in her lifetime; that the instruments drawn for that purpose are as set out in the petition; that they were drawn by his mother's counsel; that it was a mutual mistake that the warranty deed should be drawn without reserving a life estate to his mother, and he is willing that the court, by its decree, vest a life estate in said property in his mother, subject to said lease, and

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if said lease fails to conform to the intentions of the parties, he consents that the court may reform it to conform to the intentions of the parties. All other allegations were denied. Defendant further says that, on December 7, 1916, after this suit was commenced, the plaintiff, with full knowledge of the nature of said lease, accepted from this defendant \$170 in part payment of the rent reserved to her in said lease.

The reply was a general denial.

The other defendants entered their appearance, but did not plead to the petition.

The cause was tried to the court in June, 1917, taken under advisement, and on September 28, 1917, the court entered its finding that, in order to make the deed contain the understanding of the parties, the following item should be incorporated therein to-wit: "It is understood and agreed that the grantor reserves to herself in and to the lands herein described a life estate and this deed is made subject to the life estate of the grantor during her natural life."

The court also found that there was a mutual mistake of fact made in the execution of the lease, and it was ordered and decreed that the said lease be reformed by incorporating therein the following clause, to-wit:

"It is understood and agreed by the parties to this lease that the value of improvements that may be made by the party of the second part under the provisions of this lease shall not be taken as credits on the annual rents reserved, but such in improvements shall operate as an extension of the term of this lease for a period sufficient to pay the party of the second part for the same at an annual rental of five hundred dollars.

"And it is further ordered, adjudged and decreed by the court that the plaintiff and defendant, Thomas R. Smith, pay the costs of this suit in the proportion of one-half each, and that execution issue therefor."

After motion for new trial was overruled, plaintiff appealed.

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I. Appellant insists that in view of the relation of parent and child between her and her son Thomas, the burden of showing fair dealing and the absence of undue influence shifted to the defendant.

Undue
Influence.

There was no evidence tending to show any relation of trust and confidence between plaintiff and her son Thomas except that which exists between parent and child, and such relation is not sufficient to justify the cancellation of a deed or conveyance from a parent without showing the exercise of undue influence or the existence of fraud or that some advantage was taken by the son of the mother's weak condition of mind. [McKinney v. Hensley, 74 Mo. 326, 332; Hamilton v. Armstrong, 120 Mo. 597, 615; Doherty v. Noble, 138 Mo. l. c. 32; Bonsal v. Randall, 192 Mo. 525, 531, 532; Huffman v. Huffman, 217 Mo. 182, 192, 117 S. W. l. c. 3; Mackall v. Mackall, 135 U. S. 167]

It is unnecessary and would be unprofitable to set out the voluminous evidence on this or any other issue in the case. It justified the learned trial court in finding that the utmost fairness and a desire to secure to Mrs. Smith an adequate income from her farm, which, from her age and infirmities, she was unable to operate, and to preserve the estate intact for her children, characterized the dealings of her son Thomas. He took upon himself a burden that he alone of all the children was able to carry, which required the advancement of considerable sums of money and his personal attention for probably ten or more years before he could be reimbursed for his outlays.

II. It was attempted to be shown by medical experts that at the time the lease and deed were executed, Mrs. Smith was of unsound mind and incapable of entering into such contractual relations with her son. That issue was not tendered by the petition. It is not averred she was of unsound mind or mentally incapable of transacting her business. At the trial,

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eight months after the lease and deed were executed, she very clearly related the conversations and agreement between herself and her son at and prior to their execution in August, 1916. The evidence of her son Thomas differed in a few details from that of his mother in this respect. This circumstance alone explodes the testimony of the medical experts. Aside from this consideration, there was the testimony of disinterested witnesses who had known Mrs. Smith for many years as to her contemporaneous statements of the transaction, which harmonized with Thomas's evidence at the trial.

III. Appellant contends that because four of the grantees refused to accept the deed it is therefore void; that is, all of the grantees must accept the deed before it becomes operative. *McNear v. Williamson*,
Acceptance. 166 Mo. 358, is cited. This question did not arise in that case. It was there held that delivery of a deed is the consummation of the act, and in order to its accomplishment there must be a meeting of the minds of the parties on the purpose. It is admitted in the petition that the deed was delivered to Thomas. There is no question that Hugh also accepted it. The legal effect of the deed was to convey an undivided one-sixth part of the farm to each of the grantees, if he accepted by them. Mrs. Smith did not write in the deed a condition avoiding it unless all the grantee should accept it. It was intended as an advancement to each of her children and the law will not imply a condition of defeasance in case one or more of the grantees should fail to accept the deed. The petition avers that the deed was never delivered to any defendant other than Thomas, but was rejected by the other grantees. The petition does not seek relief against Thomas on the theory of non-delivery to and non-acceptance by the other grantees, but solely because of undue influence and the failure to reserve a life estate for the grantor. The deed and lease were executed contemporaneously, as one transaction, and should be read together. The deed was made subject to the lease. This

was explained by Mrs. Smith's attorney, Mr. Martin, at the time the instruments were drawn. Moreover, after Mrs. Smith had consulted her attorneys about this action she asked Thomas to pay the first installment of rent, \$250, due January 1, 1917, saying she wanted to buy some hogs to eat her part of the damaged crop on the farm. He paid her \$170, which she paid to her attorneys on their fee in this case. She then knew all the conditions. She cannot play fast-and-loose. By demanding and accepting part of the rent received in the lease she affirmed the contract with her son Thomas, subject, of course, to her right to have mutual mistakes in the deed and lease corrected. But the court should have canceled the deed as to the defendants George W. Smith, Grover C. Smith, Edward B. Smith and Josephine S. Williams because of their refusal to accept it.

IV. There remains a question about the payment of taxes and interest on the two deeds of trust on the farm which, no doubt inadvertently, is not settled by the decree. Thomas admitted in his answer that he was to pay these and he was not to have credit on the rent therefor. If the \$500 annual rentals should be insufficient for the comfortable support of his mother, he agreed to advance such further sums as would be sufficient. He also agreed to make permanent improvements not to exceed the value of \$1500, pay the taxes and other fixed charges (which we understand to be interest on the two deeds of trust) over and above the \$500 per year, "for which he should have a lien on the farm, but such payments and improvements shall operate as an extension of the terms of this lease for a period sufficient to pay him therefor at an annual rental of \$500." There was little, if any, dispute about the facts; the pleadings entitled the parties to have the lease reformed. The decree, however, reforming the lease, should include the payment of taxes and interest as above indicated.

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The judgment is therefore reversed and the cause remanded with directions to enter a judgment and decree as indicated in the foregoing opinion. All concur.

In Re Petition of LOUIS OPPENSTEIN, EUGENE BLAKE, BIRD H. MCGARVEY and W. H. MOORE.

In Banc, July 22, 1921.

1. **ELECTION BALLOTS: Evidence in Criminal Prosecution: Constitutional Provision: Power of People.** The people have power, by a constitutional provision, to prohibit the use of ballots cast at an election as evidence in a criminal prosecution, and if they have so prohibited their use no argument to the effect that the Constitution should not be permitted to stand in the way of a prosecution for crime can be indulged by the courts.
2. ———: ———: ———: **Governmental Policy: Province of Courts.** The question whether election ballots can be used as evidence in a criminal prosecution was determined by the convention which framed the Constitution and by the people who adopted it, and with that policy the courts have nothing to do. The whole power of the courts in reference thereto is to decide what policy was adopted, and if the policy is written in the Constitution, whether good or bad, the courts will not displace it and substitute another.
3. ———: ———: **Secrecy.** The proposition that a simple provision in the Constitution that "elections shall be by ballot" introduces absolute secrecy, is established by the decision of the courts, the views of text-writers, and the history of the origin of voting by ballot and the nature of the evils it was intended to remedy.
4. ———: ———: ———: **One-Sided Policy.** At the time the Constitution of 1875 was adopted, it was settled beyond doubt that election by ballot meant an election by secret ballot; and the question of policy was not one-sided, but the convention made choice between policies, and the choice is expressed in Section 3 of Article VIII of the Constitution the people adopted.
5. ———: ———: **Constitutional Provision: Modification: Election by Ballot.** Words used in the Constitution cannot be modified or affected by anything outside of the Constitution; they cannot be changed by the Legislature or the courts or by any other than the people. The words of the first clause of Section 3 of Article VIII

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that "all elections by the people shall be, by ballot" had a definite and settled meaning when they were written into the Constitution, and if they stood alone and unqualified by other words therein it would have to be ruled that ballots cast or counted at an election cannot be used in a criminal prosecution.

6. ———: ———: ———: **Secrecy: Removal by Numbering.** The provision in the Constitution requiring the ballots to be numbered removes the veil of secrecy to some extent, but does not destroy it entirely; it does not uncover the ballot of any voter, nor does the provision authorize any action by any one which would, of itself, disclose the character of the ballot.
7. ———: ———: ———: ———: ———: **Comparing Ballots.** Except in cases of contested elections, no permission is given by the Constitution to compare the ballots with the list of voters; and the fact that such permission is expressly given in election contests is no reason for saying that such a comparison may be made in proceedings which are not election contests, such as a criminal prosecution growing out of alleged frauds at an election.
8. ———: ———: **Election Officers: Permission to Testify: Ballots as Evidence: Wisdom.** Section 3 of Article VIII of the Constitution permits election officers to testify in judicial proceedings concerning the way in which a voter voted, but that provision has nothing to do with the use of the ballots in evidence. And the use of the ballots cannot be authorized on the theory that it is absurd to permit such secondary evidence and exclude the primary evidence, for the question is not the wisdom or consistency of the provisions, but what they declare.
9. ———: ———: **Comparison in Contests: Inapplicable to Other Proceedings.** The proviso that "in all cases of contested elections, the ballots cast may be counted, compared with the list of voters, and examined under such safeguards and regulations as may be prescribed by law," does not authorize the use of ballots in proceedings other than cases of contested elections. It has no pertinence to any proceeding except cases of election contests, and cannot be extended to such other proceeding. The proviso does not of itself expressly prohibit the use of ballots in other proceedings, yet the very fact that special provision was deemed necessary in cases of election contests makes applicable the well known canon of construction that *expressio unius exclusio alterius est*.
10. ———: ———: ———: ———: **As Interpreted by The Constitutional Convention.** That the proviso to Section 3 of Article VIII of the Constitution does not apply to judicial proceedings is further made plain by a rejection by the Constitutional Convention, by a vote

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of 42 to 23, of a proposed substitute which declared that "all ballots shall be subject to inspection and examination in all cases of contested elections and judicial proceedings."

11. ———: ———: **Ballots as Evidence: Statutory Authority.** In so far as a statute (Sec. 5403, R. S. 1919) conflicts with the Constitution it is without force, for the Legislature has no authority to authorize what the Constitution prohibits.
12. ———: ———: ———: ———: **Primary Elections.** Section 3 of Article VIII of the Constitution does not apply to primary elections, and the Legislature is not restrained by said section from enacting a law pertaining to them.
13. ———: ———: ———: **Exposure by Contest: Vote for Other Officers.** Where other officers were voted for in the municipal election, and in a contest instituted for the office of mayor a comparison of the ballots with the lists of voters is being made, it is unlawful to make public how said voters voted for such other officers, and if their ballots have thereby been exposed and the veil of secrecy destroyed it would be still further unlawful to use them as evidence in a criminal prosecution.
14. ———: ———: ———: **Statutory Prohibition.** Section 5403, Revised Statutes 1919, declaring that ballots shall "in no way be used or any information disclosed that would tend toward showing who voted any ballot," while invalid in so far as it relates to cases of election contests, is not otherwise prohibited by the Constitution, and forbids the use of ballots as evidence in a criminal prosecution.
15. ———: ———: ———: **Governmental Policy: Power of Courts.** If the State of Missouri has tied her hands by her Constitution, it is not within the power of the courts or of the Legislature to untie them. Furthermore, if one court can open ballot boxes in any proceeding other than an election contest, all courts can do likewise and the ballot would no longer be a secret ballot.
16. **DENIAL OF WRIT IN ANOTHER CASE.** The denial of a writ in another similar case by merely marking the word "denied" on the application cannot be considered as overruling previous decisions. Writs are frequently denied for reasons which do not arise out of substantive law.

Habeas Corpus.

PETITIONERS DISCHARGED.

Frank W. McAllister, Chas. M. Blackmar, Armwell L. Cooper and Edward J. Curtin for petitioners.

(1) *Habeas corpus* is the appropriate remedy to secure discharge from custody under a judgment or order exceeding the jurisdiction of the court or which is made in violation of positive law. Sec. 1909, R. S. 1919; *Ex Parte Arnold*, 128 Mo. 256; *In re Heffron*, 179 Mo. App. 639. (2) Section 3 of Article VIII of the Constitution of Missouri is so clear and explicit that it would seem no controversy could arise as to its meaning and effect. It provides: (a) That all elections shall be by ballot; (b) That every ballot shall be numbered in the order in which it is received, and the number recorded on the list of voters, opposite the name of the voter who presents it; (c) that the election officers shall not be permitted to disclose how any voter shall have voted, unless required to do so as witnesses in a judicial proceeding; (d) That in cases of contested elections the ballots cast may be counted, compared with the list of voters, and examined under such safeguards and regulations as may be prescribed by law. As a matter of fact, so far as the proceedings here involved are concerned, there can be no real controversy. (3) There is no sort of basis for the contention that the ballot boxes may be opened, the ballots counted or examined and compared with the list of voters, except in one particular class of cases, i. e., "cases of contested elections." (4) It is true that under the third provision the election officers may be required, in a judicial proceeding, to disclose "how any voter shall have voted," but certainly there is no suggestion in this language that the ballot boxes may be opened and the ballots counted, examined or compared with the list of voters; and without the concluding proviso of the section, the conclusion would be inevitable that the ballot boxes could not be opened in any proceeding, not even in election contests. The proviso contains the only authority for open-

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ing the ballot boxes or counting or examining the ballots or comparing them with the list of voters, and the language is susceptible of no other construction than that this can only be done in cases of contested elections. (5) The Legislature was commanded to so safeguard and regulate the examination of the ballots, even in election contest cases, that their secrecy would not be thereby violated, and following this constitutional mandate, the General Assembly passed an Act in 1883 (Laws. 1883, p. 91), now Secs. 4911 to 4916, R. S. 1919, an examination of which will clearly disclose that the Legislature understood the Constitution to mean that even in election contest cases the contents of the ballot boxes could not be made public, but the count, examination and comparison with the list of voters provided for by the Constitution was required to be made under such circumstances that the secrecy of the ballot would not be disturbed, and, therefore, it is provided that only the parties directly interested in the contest may be present when the ballot boxes are opened and the contents examined, and they are sworn "not to disclose any fact discovered from such ballots, except such as may be contained in the clerk's certificate." The enactment of some such statute providing the "safeguards" required in Section 3 was a condition precedent to the exercise of the right to count and examine the ballots and compare with the list of voters, and until such "safeguards" had been prescribed, the right could not have been exercised. *State ex rel. v. Francis*, 88 Mo. 557; *Ex parte Arnold*, 128 Mo. 256. (5) The foregoing conclusion is fully supported and its correctness demonstrated beyond any doubt by the history of Section 3 of Article VIII of the Constitution in the Constitutional Convention, now made accessible by Volume I of "*Journal Missouri Constitutional Convention, 1875.*" It appears that the chairman of the committee on elections and electors submitted a proposed article on elections, of which Section 3 was as follows: "Section 3. All

elections by the people shall be by ballot. Every ballot voted shall be numbered in the order in which it shall be received and the number recorded by the election officers on the list of voters opposite the name of the voter who presents the ballot. The election officers shall be sworn or affirmed not to disclose how any other voter shall have voted unless required to do so as witnesses in a judicial proceeding." An amendment to Section 3 as reported was adopted as follows: "Amend Section three by adding the following: 'Provided, that in all cases of contested elections, the ballots cast may be counted, compared with the list of voters and received and such safeguards and regulations as may be provided by law.' " It will be noted that Section 3, with the above amendment, is the identical Section 3 of Article VIII of the Constitution. After the adoption of the above amendment, the following substitute for Section 3 as amended was offered: "Strike out Section three as amended and insert in lieu thereof the following: 'All elections by the people shall be by ballot, but all ballots shall be subject to inspection and examination, in all cases of contested elections and judicial proceedings, under such proceedings, regulations and safeguards as may be provided by law.' " The substitute was rejected by a vote of forty-two to twenty-three. A comparison of the substitute with Section 3, which was adopted, leaves no room for doubt as to the intention of the framers of the Constitution. It demonstrates that there was no thought of permitting the contents of the ballot boxes to be brought into open court as evidence in any sort of proceeding, and that they could only be opened and the ballots counted and examined and compared with the list of voters in election contest cases. (6) The contention that Sec. 5403, R. S. 1919, is valid as a legislative construction of Section 3, Article VIII, of the Constitution, is not tenable. It simply ignores the constitutional provision. It is clearly unconstitutional in its attempt to require the legal cus-

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todians of the ballot boxes to produce their contents before grand juries and in court proceedings other than election contests.

Cameron L. Orr, Prosecuting-Attorney, for Marshal of Jackson County.

JAMES T. BLAIR, C. J.—Petitioners constitute the Board of Election Commissioners of Kansas City. They have sued out a writ of *habeas corpus* to obtain their release from custody upon a commitment for contempt because of their refusal to obey a subpoena *duces tecum* which commanded them to produce in the Criminal Court of Jackson County the original ballots, poll books, register and certificate of the result of the election in the Fifth Precinct of the Second Ward of Kansas City, used, made and certified in that precinct at the municipal election in April, 1920.

The question presented by counsel is whether the Constitution of the State permits the ballots in question to be used in evidence in the manner in which it is attempted to use them in this case. An agreed statement of facts upon one phase of the case is referred to, as for as necessary, in the opinion.

I. In the cases of this kind it is usual for the argument to be made that unless this court holds that ballots, etc., may be freely used in evidence, frauds may go unproved and election crooks go unpunished. This case is no exception to the rule. In his brief counsel says:

“We believe the time has come when this court should fearlessly announce that nothing shall be permitted to stand in the way of the prosecution of a crime against the ballot-box. Unless we have honest elections, then government by the people is a farce, and it seems trite to say that no rights of an individual elector should be considered when the rights of the whole people are

assailed by false ballots or by false count and returns on the part of election officials."

The question the parties present in this case is whether the Constitution of the State permits the use in evidence of the ballots, and the like, used in an election to which the Constitution applies. Counsel does not deny, nor could it be denied, that the people have power, by constitutional provision, to prohibit their use in the manner in which counsel seeks to use them. Of course, if the people have not prohibited such use, the quoted argument has little application to the question in this case. It is, therefore, clear that what the argument in fact invites this court to do is that, if it shall find the Constitution does prohibit such use, it shall "fearlessly announce" that it will not "support the Constitution of the State" (Sec. 6, Art. XIV, Mo. Constitution) in so far as concerns Section 3 of Article VIII of that instrument. That counsel really intends that the court shall yield to this argument is beyond belief. It was doubtless but a slip of the pen which was, perhaps, induced by previous slips of other pens in like cases.

The question in this case is not what the people ought to have put into the Constitution. The question is, what does the provision mean which they did put into the Constitution?

II. When the Constitutional Convention came to the business of drafting the article on Suffrage and Elections, and the people came to the business of adopting the article the Convention had drafted,

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Policy: Power
of Courts.

then the question of policy was for consideration, and then the arguments, pro and con, were made and heard. The Convention proposed the adoption of the policy provided in Section 3 of Article VIII and the people adopted that policy when they adopted the Constitution the Convention had drafted. Good or bad, for better or for worse, it was written into the Constitution and this court

has no power to change it. The court may decide what policy was adopted, but it may not displace the policy adopted and substitute one which it or counsel may deem to be better. It may not amend the Constitution. It must apply it as the people wrote it.

III. The history of the adoption of the ballot as a method of voting has often been written. Constant repetition of argument based upon the assumption that there can be no consideration of sound policy which could support a provision for an absolutely secret ballot, will excuse some reference to the conditions and arguments which confronted the Constitutional Convention and the people on this head. The method of voting *viva voce* once prevailed in this State and elsewhere. The literature of the times, both legal and other, demonstrates that this method had resulted in coercion, corruption and intimidation, and was attended by rioting, violence and disorder. The bribe-giver had certain means of determining whether the votes he bought were cast as agreed. Employers, creditors, landlords, organizations of all kinds, could and did require employees, debtors, tenants, members and others, to vote as directed or suffer such punishment or inconvenience as the circumstances permitted. These were conditions and not theories. Discussions of them and references to literature on the subject can be found in the "Australian Ballot System," by Wigmore, published in 1889. Statesmen became much concerned. The system of election by ballot was designed to cure these evils. The heart of the system was secrecy. There was opposition to it. The arguments made now were made then—and others as well. The new system was rapidly adopted. At the time the Convention of 1875 was held, these arguments had been developed and amplified, *pro* and *con*. The fragments of the debates in the Convention which are still available show they were considered in that body. With these arguments before it, the Convention adopted Section 3 of Article VIII.

At that time it was already settled beyond doubt that election by ballot meant an election by secret voting. There is practically no difference of opinion as to that. The history of the origin of the system precludes any other view. Counsel does not deny this. Many of the decisions are collated in 6 C. J. pp. 1173, 1174, and 9 R. C. L. secs. 64, 65, pp. 1047, 1048. Among these are found decisions of this State which, many years ago, construed the words "election by ballot" in entire harmony with the construction almost universally given them elsewhere.

The text-books have always announced the same doctrine Judge Cooley, whose great ability is universally esteemed, expressed himself thus:

"The system of ballot voting rests upon the idea that every elector is to be entirely at liberty to vote for whom he pleases and with what party he pleases, and that no one is to have the right, or be in a position to question his independent action, either then or at any subsequent time. The courts have held that a voter, even in the case of a contested election, cannot be compelled to disclose for whom he voted; and for the same reason we think others who may accidentally, or by trick or artifice have acquired knowledge on the subject, should not be allowed to testify to such knowledge, or to give any information in the courts on the subject. Public policy requires that the veil of secrecy should be impenetrable, unless the voter himself voluntarily determines to lift it. His ballot is absolutely privileged, and to allow evidence of its contents when he has not waived the privilege, is to encourage trickery and fraud, and would in effect establish this remarkable anomaly, that, while the law, from motives of public policy, establishes the secret ballot with a view to conceal the elector's actions, it at the same time encourages a system of espionage, by means of which the veil of secrecy may be penetrated and the voter's action disclosed to the public." [Cooley on Constitutional Limitations (17 Ed.), pp. 912, 913.]

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Numerous decisions support this text. This language is quoted and approved in McCrary on Elections (4 Ed.) secs. 488, 489.

In *People v. Cicott*, 16 Mich 1. c. 312, CHRISTIANCY, J., with whom COOLEY, C. J., and GRAVES, J., concurred, said:

“The object of this requirement (that all votes ‘be given by ballot’), when considered with reference to the history of our country and the whole theory of popular governments, is too plain to be misunderstood. It was to secure the entire independence of the electors, to enable them to vote according to their own individual convictions of right and duty, without fear of giving offense or exciting the hostility of others. And with this view the right is secured to every voter of concealing from all others, or from such of them as he may choose, the nature of his vote, or for what person or party he may have voted. This important object, vital as I think it is in our system of government, would be substantially defeated if the voter could be compelled to disclose even in a court of justice, how he has voted. The Constitution and our statutes which have followed out its spirit, have thrown over the voter an impenetrable shield, under which he may keep the secret of his vote until he shall see fit to disclose it. . . . How an elector may have voted is, under the Constitution and the law, a fact which no man has a right to learn, in this or any other manner, till the elector himself may choose to make it public.”

The proposition, then, that a simple provision that “election shall be by ballot” introduces absolute secrecy, is established by the decisions of the courts, the view of the text-writers, the history of the origin of voting by ballot and the nature of the evils it was intended to remedy, and is not questioned by counsel for respondent, as we understand him. Further, as this court long ago pointed out, the people who adopted our Constitution and who have the power to amend or revise it, or adopt another in its stead, have not by any of these methods

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indicated dissatisfaction with Section 3 of Article VIII, as construed by this and (like provisions) practically all other courts of the country.

IV. These principles were before the Convention and the people when the Constitution of 1875 was adopted. It is therefore apparent that the question of policy was not a one-sided one as the argument of counsel in this case seems to assume. It was between policies that the Convention and the people were called upon to choose. They did choose and their choice is expressed in Section 3 of Article VIII. When the meaning of that section is determined, this case is decided.

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Policy.**

V. The first clause in Section 3 of Article VIII is that "all elections by the people shall be by ballot." As already pointed out, these words, at the time they were written into our Constitution, had a definite and settled meaning. If they stood alone and unqualified, there could be no question about their meaning, and petitioners' position would have to be sustained without further ado. It is also true that the meaning of the quoted words cannot be held to be modified or affected by anything outside of the Constitution. The Constitution cannot be changed by the Legislature or the courts or any other than the people who adopted it. It is useless labor, therefore, to look elsewhere than in the Constitution for the modifications of the quoted clause which, respondent's counsel contends, so qualify it as to justify the restraint of petitioners.

Modification.

(1) It is urged, since the Constitution requires the ballots to be numbered, that the ballot it prescribes is no longer a secret ballot, and, therefore, the ballot of any and all voters may be examined at will. Cases are cited. These are decisions from states in which the constitutional provisions

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Ballots.**

in force merely provided that "elections shall be by ballot" or "by secret ballot," and in which the Legislature attempted to require that the ballots be numbered so that the ballot of any voter might be identified. [Williams v. Stein, 38 Ind. 1. c. 91; Brisbin v. Cleary, 26 Minn. 107; Ritchie v. Richards, 14 Utah, 373 et seq.] These decisions are that elections by ballot necessarily mean elections by secret ballot, and that the Legislature may not provide a means whereby the secrecy secured by the Constitution may be invaded; and that numbering and listing the ballots may not constitutionally be required under such provision. These decisions do not support the contention counsel makes. As heretofore pointed out by this court, the provision in Section 3 of Article VIII, that ballots must be numbered, "of course removes the veil of secrecy to some extent" but in no wise destroys it entirely. [Ex parte Arnold, 128 Mo. 256.] The provision for numbering has its uses in election contests as the section expressly provides. The mere numbering of the ballots does not, of itself, in fact uncover the ballot of any voter; nor does that provision

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Contests.**

authorize any action by any one which would, of itself, disclose the character of any ballot. Except in cases of contested elections, no permission is given to compare the ballots with the list of voters. The fact that such permission is expressly given in election contests is certainly not any reason for saying that such a comparison may be made in proceedings which are not election contests. This exception in Section 3 in no way aids respondent.

(2) Section 3 of Article VIII permits election officers to testify in judicial proceedings, concerning the way in which a voter voted. It has been suggested that it is absurd to think that the Constitution would permit secondary evidence and exclude the primary evidence, the ballots. The question is not the wisdom or consistency of what was done. The question is, what was done? It

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Permission
to Testify.**

is clear that the permission to testify has nothing to do with the use of the ballots in evidence. It is merely an exception to the provision that election officers shall not disclose how any voter voted. The exception permits them to testify and permits that only. When due consideration is given what was before the convention, the idea that this provision is absurd does not seem to be established as correct.

(3) It is contended that the proviso that "in all cases of contested elections, the ballots cast may be counted, compared with the list of voters, and examined under such safeguards and regulations as may be prescribed by law," in some way aids the argument that the ballots may be put in evidence in proceedings other than contested elections. This finally resolves itself into an argument that the quoted proviso does not limit the use of the ballots to cases of contested elections. Even if true, this could not aid respondent. The question is not whether this proviso itself limits the use of the ballots to contested election cases. Rather, it is whether the proviso extends the use of the ballots to proceedings other than contested elections. The limitation is found in other words of the section. It is too clear for argument that the proviso has no pertinence to any proceeding except cases of election contests. Upon this question *People v. Londoner*, 13 Colo. 303, is cited. That decision is chiefly concerned with the question whether *quo warranto* could be employed to determine who had been elected to office. It was held the proceeding was authorized. With the greatest respect for the learned court which rendered that decision, we find our own decisions out of harmony with its principal ruling in the *Londoner* case, and in harmony with the weight of authority elsewhere. [State ex rel. v. Francis, 88 Mo. 557. See note to State v. Ross, 245 Mo. 36, in Annotated Cases 1913E, p. 982 et seq.] In the portion of the decision upon which respondent relies, it is held that:

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“The declaration in Section 8, Article 7, of the Constitution, that the ballots may be examined in contested elections, does not limit their examination to such proceedings. The right mentioned has always been freely exercised in *quo warranto*, which is the common law method of inquiring into election frauds. And the purpose of this provision was to give, in the election contests authorized by Section 12 of the same article already considered, the privilege of inspecting ballots; not to withdraw it from the proceeding in which theretofore it had been universally exercised. The leading object of Section 8 was to preserve the purity of the ballot by insuring its secrecy; but lest the language indicating this intent should be carried too far, and become the means of perpetrating fraud, the privilege in question was carefully extended to election contests in which, perhaps, it might otherwise have been challenged.”

It is apparent that the court was deciding the question whether the provision for comparing the ballots with the lists of voters in contested election cases, itself prevented such comparison in other cases. That it does not do so is clear enough, as we have already pointed out. That is not the question here. In this case the question is whether the proviso with respect to contested elections *authorizes* the use of the ballots in proceedings other than contested elections. The learned court which decided the Londoner Case did not approach the question from that angle. Counsel seem to have assumed that the proviso respecting contested elections in Colorado was the sole restriction which could be relied upon to prevent the use of the ballots in *quo warranto* proceedings. That contention the court answered, but that answer is not relevant to the question before us. Again, though the provisos respecting contested elections in Section 3 of Article VIII and in Section 8 of Article VII of the Constitution of Colorado, do not of themselves expressly and in terms prohibit the use of the ballots in other proceedings, yet the very fact that special provision was

deemed necessary in the case of contested elections makes applicable the well known canon of construction "*expressio unius, exclusio alterius*." [Ex parte Arnold, 128 Mo. 1. c. 263, 264.] The effect of this rule is not discussed in the Londoner Case. This makes it still more apparent that the court was not called on by the briefs to consider a contention like that made here.

VI. It is argued that the decision in *Gantt v. Brown*, 238 Mo. 560, authorizes the use of the ballots, poll books, etc., in the trial of a criminal case. It is obvious that this is not a correct construction of that decision. No such question was before this court in that case. It is a poor compliment to our brethren then upon this bench to attribute to them an effort to decide a question in no wise presented by the record before them. That case dealt with an election contest and considered the meaning of the proviso to Section 3 of Article VIII of the Constitution, which proviso expressly provides that in "all cases of contested elections the ballots cast may be counted, compared with the list of voters, and examined under such safeguards as may be prescribed by law." That the question in that case has no analogy to that presented by this record, is beyond cavil. The learned writer of the opinion in *Gantt v. Brown* concurred in the opinion In Re Feinstein, in which the inapplicability of the decision to a case somewhat like this is pointed out. In the concurring opinion of LAMM, J. (in which a majority concurred), in *Gantt v. Brown*, 238 Mo. 1. c. 581, that learned jurist summed up the holding thus: "Our ruling does not mean that the secrecy of the ballot should be exposed *except in so far as it may be absolutely necessary under the allegation of the pleadings in an election contest, to show fraud, if any, and to that extent* neither the Constitution nor the statutes protects the secrecy of the ballot."

That this court in that case had no idea it was passing upon any question save that pertaining to contested

elections is obvious from the record it had before it, the language of the opinion and the rule it announced, and by the subsequent course of the judges who participated in that decision. The case of *Gantt v. Brown* has no relevancy to the question counsel present in this case.

VII. The Constitutional Convention, after having put Section 3 of Article VIII in the form in which it now stands, had before it the question of striking out that section and adopting the following: "All **Proposed Substitute.** elections by the people shall be by ballot, but all ballots shall be subject to inspection and examination, in all cases of contested elections and judicial proceedings, under such proceedings, regulations and safeguards as may be provided by law."

This substitute was rejected by a vote of 42 to 23. Three members were absent. The power to inspect and examine the ballots in "judicial proceedings" would have been given by this amendment. The Convention rejected it.

It is clear from this that the Constitutional Convention had before it, in the proposed substitute section, the very question which counsel discuss. This substitute would have expressly given the authority now sought to be exerted. When the Convention defeated it, it passed upon the question in this case. Its intent could hardly have been more clearly exhibited than by the vote upon the substitute section.

VIII. The decision *In re Massey*, 45 Fed. (D. C.) 629, is cited. In that case the question was "whether by the Act of Congress and the laws of the State of Arkansas, the custodian of ballots cast, at an **Federal Authority.** election held for members of Congress, pursuant to said laws, may be compelled by a Federal court, in administration of the criminal law of the United States, to produce the ballots cast at said election, or not." After stating the question, thus, the learned district judge held the Federal law was, in

such a case, paramount and that restrictions upon freedom of action under it could not be imposed by the State. As he remarks, he might well have left the matter there as decided by the principle he had laid down. Nevertheless, he proceeded to discuss the question whether the laws of Arkansas made any provision which would permit the examination of the ballots in a case to which those laws applied. With great respect, we do not deem this part of the opinion deserving of great weight in the question in the instant case. First, it is clearly and admittedly *obiter*; second, it reaches a conclusion as to the construction of a law of a state which is in conflict with the construction of that law placed upon it by the highest court of that state; third, the learned judge obviously goes into the discussion of what the law should be, of what the *proper* policy is, rather than into the question of what the law means, i. e., what policy the state had adopted.

IX. Section 5403, Revised Statutes 1919, is cited. It is, of course, not contended by counsel that this section can be held to give authority which is denied by the Constitution. In so far as it conflicts with the Constitution it is without force in this case. The Statute. Legislature had no power to authorize what the Constitution prohibits. This is not a primary election case. With respect to such elections the Legislature is not restrained by the Constitution, since Section 3 of Article VIII does not apply to them.

X. It is said that in an election contest in Kansas City the list of voters was made and the respective numbers of the ballots cast were shown in connection with the names on this list, and that it was also shown for whom each voter voted and that all this is on file in the office of the Circuit Clerk of Jackson County.

Votes for
Other
Officers. It is argued that these facts show that the ballots have already been exposed and that "the veil of secrecy has been destroyed and there

In re Oppenstein.

is now no foundation for the contention that the ballots of any precinct, so exposed in the election contest, should not be produced in evidence." The agreed statement of facts shows that the contest referred to affects the office of mayor only. The ballots listed seem to have been those cast for contestant in that case. Many other officers were voted for and against in that election. The lists show what ballots were cast for contestant in the mayoralty race and who cast them. They could not legally have included a showing as to officers other than mayor. The only votes which lawfully could have been reported upon and made public in the contest case are those for mayor. The examination of ballots, in so far as they affect one race for office, which lawfully may be counted and compared with the list of voters in an election contest, in no wise authorizes the making public of the way in which those who cast such ballots voted on other offices. Further, if the votes pertaining to races other than that for mayor were unlawfully made public, this unlawful act would not justify another violation of the Constitution in this proceeding. This is too clear to require argument.

XI. While Section 5403, Revised Statutes 1919, in so far as it conflicts with the Constitution, is inapplicable to ballots cast at an election which is such in a constitutional sense, it is entirely general in its terms and applies to all ballots except to the extent to which the Constitution prevents such application. There is nothing in Section 3 of Article VIII which prohibits the Legislature from enacting that the ballots shall not be used in evidence in proceedings other than contested election cases. Therefore even though it could be held that the Constitution did not prevent the use of the ballots in this case in the way in which it is sought to use them, still the effect of Section 5403 would have to be considered. That section, among other things, provides that the ballots shall "in no way be used or any information disclosed that would

**Statutory
Prohibition.**

tend toward showing who voted any ballot."

In this case it is proposed to bring into court and use in evidence ballots of which, as shown by the agreed statement of facts, the numbers and names of the voters who cast the particular ballots are already on file in the office of the Circuit Clerk of Jackson County. This record in the clerk's office, respondent insists, is a public record. To say that the use of the ballots in evidence would not, in these circumstances, "tend toward showing who voted any ballot" would require some hardihood. The statute prohibits their use.

XII. State ex rel. v. Kinsey (No. 18035), which was referred to in State ex rel. Feinstein v. Hartman (No. 22,572), is not cited by respondent in this case. In the

Denial of Writ in Another Case. Feinstein Case enough was said of State ex rel. v. Kinsey to show that it was inapplicable in that case. There was no occasion to go further at that time. In this case it is sufficient

to say that in the Kinsey Case the application for the writ was disposed of without opinion and that it nowhere appears what reason moved the court to deny the writ for which application was made. It is quite certain that the court could hardly be thought to have intended to overrule any of the previous decisions by merely marking an application for a writ "denied." It would be a remarkable departure from its customary practice if it did so intend. It is quite as certain that it did not intend to decide anything which would contravene the Constitution. It would have done both had it intended its action in denying the writ to be interpreted as counsel interpreted it in the Feinstein Case. Writs are frequently denied for reasons which do not arise out of substantive law.

XIII. Nearly all the arguments advanced by respondent have been considered heretofore by this court in decisions cited in previous paragraphs. To some extent we have reconsidered these and given expression to

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our views upon them. If, as said in *State ex rel. v. Francis*, supra, the State of Missouri has tied her own hands, the court is not empowered to undo what she has done. Also, as said in *Ex parte Arnold*, supra, if one court may open the ballot boxes, then all courts may do so and the ballot no longer is a secret ballot. So far as concerns the question urged by respondent, the people have chosen the policy they desired. They had full power to choose. Courts and Legislature must abide by that choice.

The petitioners are discharged from custody. All concur, except *Higbee* and *D. E. Blair, JJ.*, who dissent.

THE STATE ex rel. LEO E. KOEHLER v. MILES
BULGER et al., Judges of County Court.

In Banc, July 22, 1921.

1. **MANDAMUS: Payment of Salary.** Mandamus is an appropriate remedy to compel a public official, whose duty it is to pay another official his salary, to pay such salary, where its amount is fixed by law; for then no discretion is left as to the amount, and where the only question is what is the amount the law fixes as the salary, it is purely a legal one.
2. **COUNTY ENGINEER: Salary: For Ex Officio Duties Only.** The words of the statute (Sec. 10556, R. S. 1909) providing that in counties containing fifty thousand inhabitants, etc., "the county surveyor shall be *ex officio* county highway engineer, and his salary as surveyor and *ex officio* county highway engineer shall be not less than two thousand dollars and not more than three thousand dollars, as fixed by the county court," in view of the history

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of the statute preceding such proviso, has reference to *ex officio* duties and *ex officio* salary only; the proviso did not mean that the county court could fix the salary of the officer both as county surveyor and *ex officio* county highway engineer at less than the statutory salary of the surveyor, but the term "as surveyor and *ex officio* county highway engineer" had reference to the office of engineer, and not to that of surveyor.

3. ———: ———: **Amendment of 1919.** Likewise the amendment to such statute made in 1919 (Sec. 10787, R. S. 1919) providing that in such counties "his salary as surveyor and *ex officio* county highway engineer shall be not less than three thousand dollars and not more than five thousand dollars, as may be fixed by the county court," meant that the salary of the *ex officio* county highway engineer, for the performance of the duties of that office, should be not less than three thousand dollars, in addition to his salary as county surveyor. The statute did not mean that the court could fix his salary for the performance of the duties of both offices at not less than three nor more than five thousand dollars, but it meant that the court could fix his salary for his *ex officio* duties as highway engineer at not less than three nor more than five thousand dollars, and did not give the court power to fix his salary as surveyor at all. In such counties, he is entitled to at least three thousand dollars a year, in addition to his statutory salary as county surveyor.

Mandamus.

WRIT GRANTED.

Clinton A. Welsh for relator.

(1) The law relating to the office of county surveyor is found in Secs. 12709-12745, R. S. 1919. This is a separate and independent chapter creating the office of county surveyor; this is the office to which relator was elected, and about which there is no dispute. He is entitled to a salary of \$3,000 per annum as county surveyor and bridge commissioner, under Sec. 11041, R. S. 1919. (2) The office of county highway engineer was created in 1907, Laws 1907, p. 401. The office was to be filled by appointment made by the county courts of the different counties in the State. The laws of 1909,

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Laws 1909, p. 755, now Sec. 10787, R. S. 1919, provided for the filling of the office of county highway engineer in counties of rank of Jackson County by providing that the county surveyor shall be *ex officio* county highway engineer. The county surveyor has no option as to whether he shall be *ex-officio* county highway engineer, but the law makes it obligatory upon him to hold the office. State ex inf. v. Southern, 265 Mo. 285. Relator was elected to the office of county surveyor of Jackson County, Missouri. The law attaches to this office *ex officio* the office of county highway engineer; that is, the law thus connects the two offices with separate and distinct duties together, and required the same person to discharge the duties of both offices. Callahan v. Davis, 125 Mo. 27; Howard v. Heck, 88 Mo. 259; Jones v. Williams, 139 Mo. 66. (3) An officer holding two offices can claim compensation for both offices. 29 Cyc. 1424; Dyche v. Davis, 92 Kan. 971, 977. (4) The law relating to county surveyors and the law relating to county surveyors and *ex officio* county highway engineers has been continued in force in this State for some time, and it must be presumed that the Legislature meant just what it has done. It was provided in Sec. 10556, R. S. 1909, that the county surveyor in counties of the population of Jackson County shall be *ex officio* county highway engineer, and his salary "as surveyor and *ex officio* county highway engineer shall not be less than \$2,000 and not more than \$3,000." If the Legislature did not intend this salary as compensation for services as county surveyor and *ex officio* county highway engineer, in addition to his salary of \$3,000 under Sec. 10737, R. S. 1909, as county surveyor and bridge commissioner, then their intent was to cut down the salary of the county surveyor, in counties of the population of Jackson County, and to pay nothing for his services as county surveyor and *ex officio* county highway engineer. Cunningham v. Current River Ry. Co., 165 Mo. 271.

A. L. Cooper, County Counselor, and *Wallace Sutherland*, Assistant County Counselor, for respondents.

(1) An officer is entitled to no compensation for services unless the statute gives it, and statutes providing for compensation must be strictly construed. *Gammmon v. Lafayette County*, 76 Mo. 675; *State ex rel. v. Wofford*, 116 Mo. 220; *State ex rel. v. Brown*, 146 Mo. 401; *State ex rel. v. Adams*, 172 Mo. 1. (2) Statute fixing salary of surveyor and *ex officio* county highway engineer embraces entire compensation. (3) The case of *State ex rel. McGrath v. Walker*, 97 Mo. 162; *State ex rel. v. Sheehan*, 269 Mo. 421, and *Cunningham v. Current River Ry. Co.*, 165 Mo. 271, referred to by relator, all involved the right to extra compensation where the language of the statute was clear that the compensation for additional service was in addition to other compensation. (4) In view of the plain provisions of the statute, there is neither necessity nor occasion to discuss other questions referred to by relator, for as said in the *McGrath* case, it could make no difference whether *McGrath* was *ex officio* a member of the board of equalization or not, the law being clear in either event.

GRAVES, J.—This is a proceeding in mandamus. To relator's petition, the respondents, who constitute the County Court of Jackson County, entered their appearance, waived the issuance of our alternative writ, and filed their demurrer to such petition as if it were the alternative writ. The questions are purely questions of law. Relator was elected County Surveyor of Jackson County in November, 1920, and took possession of his office January 1, 1921. The contest is over the amount of salaries to which he is entitled. By virtue of his election to the office of County Surveyor he avers that he became *ex officio* County Highway Engineer of said county. He avers that he is entitled to \$250 per month as County Surveyor and Bridge Commissioner, which he

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says the respondents have regularly paid him. He also avers that he is entitled to \$250 per month *ex officio* County Highway Engineer, which salary for the month of January the respondents duly paid to him, but that since said month of January the respondents have claimed that he was only entitled to the sum of \$2,000 per year as *ex officio* County Highway Engineer, instead of \$3,000, thus making his aggregate salaries for the two offices, \$5,000 per annum, instead of \$6,000 per annum. He avers that since January the respondents have tendered to him each month a warrant for his salary as *ex officio* County Highway Engineer in the sum of \$166.66 $\frac{2}{3}$, which is the monthly salary if he is only entitled to \$2,000 per annum, instead of \$3,000 per annum. These warrants the relator declined to accept, but had throughout demanded \$250 per month. The several sections of the statutes under which relator bases his claims are cited and set out in his petition, but these we leave for the opinion. As the demurrer admits all well pleaded facts, we have the simple issue as to whether or not the relator, under the law, is entitled to \$250 or only \$166.66 $\frac{2}{3}$ per month as *ex officio* County Highway Engineer.

He asks that this court compel the respondents, as judges of the County Court of Jackson County, to issue him warrants for the months of February, March, April and May, in the sum of \$250 each, or in the aggregate sum of \$1000 for the four months. Such is the case for determination.

I. It may be conceded, as suggested by the respondents, that it devolves upon relator to show a clear right to the remedy herein sought. If, however, the amount of a salary is fixed by law, and for that reason no discretion is left as to the amount, then *mandamus*. *Mandamus* is an appropriate remedy to enforce the payment of a salary to a public official against the officer or officers, whose duty it is to pay such official. In such cases the salary is a fixed amount, if it exists at all, and

the sole question is the legal one as to whether or not there is a liability. In the insistence above, respondents do not mean to question the remedy used in this case, but what they mean is that it must be plain that the salary claimed is one allowed by law. This clearly appears from the whole brief.

II. Relator contends that he holds two offices, one by election and the other *ex officio*. These offices he contends are created and governed by separate laws, and the duties thereof are fixed by such separate laws, and further that the salaries are likewise fixed by these separate statutes. The county surveyor, and his duties and fees, are fixed by Chapter 117, Revised Statutes 1919. It is an ancient office coming to us from Territorial days. Highway engineer is much more modern (Laws 1907 p. 401), and the provisions of law governing this office is found in Article 6 of Chapter 98, Revised Statutes 1919. By the Act of 1907, *supra*, the office was first created. In 1909 this Act of 1907 was repealed and a new law enacted in lieu thereof, which became Article V of Chapter 102, Revised Statutes 1909. This Act of 1909 in its general provisions is substantially the same as the present law, Article 6 of Chapter 98, Revised Statutes 1919. There were, however, some changes made in 1919, which are material here.

It would perhaps be best to start with the Act of 1907, Laws 1907, page 401. By this act there was created in the several counties of the State "the office of county highway engineer." Such officer was to be appointed by the county court for a term of two years, the salary of which office should not be less than \$300 nor more than \$2,000 as might be fixed by an order of the county court. The office was separate and distinct from that of county surveyor. The county surveyor was not mentioned in the act. By the Act of 1909, which became Article V of Chapter 102, Revised Statutes 1909, the first section (Sec. 10551, R. S. 1909) created the office of county high-

way engineer, such office to be appointed by the county court for term of one year, and until his successor was appointed and qualified. This Section 10551 applied to the "several counties" of the State. The fee provision of this Act of 1909 (which became Sec. 10553, R. S. 1909) reads:

"The county highway engineer shall receive such compensation as may be fixed by order of the county court of his respective county: *Provided*, his salary shall not be less than three hundred dollars nor more than two thousand dollars per annum: *Provided*, further, that in all counties in this State which contain or may hereafter contain more than fifty thousand inhabitants, and whose taxable wealth exceeds, or may hereafter exceed, the sum of forty-five million dollars, and which adjoin or contain therein, or may hereafter adjoin or contain therein, a city of more than one hundred thousand inhabitants by the last decennial census, the county surveyor and *ex officio* highway engineer shall receive a salary of not less than two thousand dollars nor more than three thousand dollars, as may be fixed by the county court."

By Section 10556, Revised Statutes 1909, the county court was authorized to appoint the county surveyor as county highway engineer, if he were competent. In which event, such county highway engineer should "receive the compensation fixed by the county court, as provided in Section 10553, in lieu of all fees, except such fees as are allowed by law for his services as county surveyor." Up to this date no fees had been established for a county highway engineer, nor is it a fee office now. It was a salary as fixed by the county court. There were fees then allowed to the county surveyor. [Sec. 10714, R. S. 1909.] See also Revised Statutes 1909, Section 11327, as to counties having 50,000 or more inhabitants and which adjoin a city of more than 300,000 inhabitants. In this Section 10556, Revised Statutes 1909, it was further provided:

"*Provided*, however, that in all counties in this State which contain or which may hereafter contain

more than fifty thousand inhabitants, and whose taxable wealth exceeds or may hereafter exceed the sum of forty-five million dollars, or which adjoin or contain therein, or may hereafter adjoin or contain therein, a city of more than 100,000 inhabitants by the last decennial census, the county surveyor shall be *ex officio* county highway engineer, and his salary as surveyor and *ex officio* county highway engineer shall be not less than two thousand dollars and not more than three thousand dollars, as may be fixed by the county court, and all fees collected in such counties by the surveyor, for his services as surveyor, shall be paid into the county treasury, to be placed to the credit of the county revenue fund."

This covered Jackson County, but in 1907 the county surveyor of said county had been placed on a salary basis, and his salary fixed at \$3,000 per year payable monthly. [R. S. 1909, sec. 10737; Laws 1907, p. 420.]

Bearing in mind that both Sections 10556 and 10737 applied to Jackson County the question is, how is the expression "as to surveyor and *ex officio* county highway engineer" as used above, to be understood? We start with this Act of 1909, because we can best get the bearings at this date. Shall we, in the face of the fact that the County Surveyor of Jackson County was a salaried office, and the salary fixed by law at \$3,000 per annum, reasonably say that Section 10556 in this proviso, meant to combine both offices and make the salary of both dependent upon the order of the county court, with a maximum for both services of \$3,000, or shall we say that the expression "salary as surveyor and *ex officio* county highway engineer," as used here, has reference to the *ex officio* duties and the *ex officio* salaries? We are inclined to the latter view, when the history of the laws are considered. The surveyor has always been an elective officer, and this elective office had been and was upon a salary basis in Jackson County, and the counties of its class, when the office of county highway engineer was created. We had no county highway engineer prior to 1907, and

by the Act of 1907 they were appointed by the county court and their salary fixed by order of the county court. Not until 1909 were duties of this office made *ex officio* the duties of the surveyor in such counties as Jackson. It is hardly reasonable to hold that the lawmakers intended to have the county court fix the salary for the duties of the surveyor and for the county highway engineer, and be empowered to fix the salary of both at less than the statutory salary of the surveyor. We are inclined to the view that the term "as surveyor and county highway engineer" had reference to the office of engineer and not that of surveyor. If he were signing instruments in the capacity of engineer, he would properly sign "County Surveyor, and *Ex officio* County Highway Engineer." In fact to sign otherwise would be wrong. [Callahan v. Davis, 125 Mo. 27.]

We conclude that under the Act of 1909, Revised Statutes 1909, secs. 10551 et seq., the reference in Section 10556 as to salary has reference solely to the duties as engineer. What we have said as to Section 10556 applies with equal force to Section 10553, both of which we have quoted, supra. The amendments to the Act of 1909 we take next.

III. Going now to more recent amendments, we shall try to find the present status of this office in Jackson County. It must be borne in mind that we are discussing the statutes applicable to that county and counties of its class, and not other counties or classes of counties. In 1919, Section 10551, Revised Statutes 1909, was amended. [Laws 1919, p. 636.] By this amendment (which is now Sec. 10782, R. S. 1919) the county court appoints the county highway engineer for no fixed term, but for such time as that body finds advisable, and at a compensation to be fixed by the court. This therefore left all county highway engineers to be appointed by the county courts, except the excepted classes found in the statutes. Jackson County belonged to an excepted class under the Act of 1909, and so continues today. [Sec. 1787, R. S. 1919.]

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In 1919, Laws 1919, p. 634, Section 10556, Revised Statutes 1909, was amended and the substantial amendment was to change the old law where it gave the county court the right to allow from \$2,000 to \$3,000, so that the county court could allow from \$3,000 to \$5,000. This amended section is the present Section 10787, Revised Statutes 1919.

What we said as to old Section 10556 applies with equal force to this new section, in so far as the office to which it refers is concerned. As said, the salary of the county surveyor was fixed by law. He is and was an elective officer. It must be kept in mind that the office of county highway engineer, and of county surveyor, are separate offices, with separate and distinct duties. In this age of road building (the thing which called for a highway engineer) the duties of the office of highway engineer are extremely onerous, and it is not reasonable to conclude that the law-makers intended to abolish the salary of the surveyor (which was \$3,000) and give the county the power to say that the duties of both officers must be performed for \$3,000 per year. Yet, if respondents are right in their contentions, then the County Court of Jackson County could make an order that relator should be allowed only \$3,000 for both offices. Their contention amounts to saying that the Act of 1909, as well as the Act of 1919, in effect, repealed Section 10737, Revised Statutes 1909, now Section 11041, Revised Statutes 1919, which fixed the salary of county surveyor at \$3,000 per annum.

We do not believe that the law-makers so intended. If it was intended to so combine the two offices by the Act of 1909, Section 10556, Revised Statutes 1909, that only one salary was to be paid, the intention would have been more specifically made, and some mention would have been made of the fixed salary of \$3,000 to the surveyor alone. With the view urged by respondents, the real purpose of the Act of 1909, was to empower the county court, by order, to reduce the salary of surveyor (fixed

by the existing law) from \$3,000 to \$2,000, and allow such officer nothing for the duties of "county surveyor, and *ex officio* county highway engineer." Such would be the effect of the contention made by respondents, as to the Act of 1909. So, too, as to the present law.

If it be true that the present Section 10787 was an allowance for both offices, then by order of the county court the salary for both offices could be fixed at \$3,000, whilst the existing laws allow \$3,000 to the surveyor's office alone, and the Act of 1909 must have repealed the section which fixed the surveyor's salary at \$3,000, which section is now Section 11041, Revised Statutes 1919. This for the reason that such section fixed a salary by law, and Section 10737 (as respondents would have us construe it) vests the power of fixing the surveyor's salary in the county court. The Act of 1909, Laws 1909, p. 755, which is the basic law involved, shows no legislative intent to make such a repeal.

It specifically mentions the things repealed, but no part of the Surveyor's Act, or the act concerning his salary, are mentioned. So we repeat what we said as to the Act of 1909, that the words "as county surveyor and *ex officio* county highway engineer" as used through all these acts has reference to the office and to the duties of the highway engineer, and the pay there mentioned is to cover those duties, and not to cover the duties of the county surveyor as such. For services as county surveyor, the salary is fixed at \$3,000 per annum. For "county surveyor and *ex officio* county highway engineer" the salary is not less than \$3,000 nor more than \$5,000. More than the minimum of \$3,000 cannot be claimed, unless the county court has so ordered. The \$3,000 is fixed by law, and must be paid.

We conclude that relator is entitled to two salaries of \$3,000 each, one as county surveyor, under Section 11041, Revised Statutes 1919, and one under Section 10784, Revised Statutes 1919.

It therefore follows that our alternative writ should be made permanent, and it is so ordered. All concur.

THE STATE ex rel. JOPLIN & PITTSBURG RAIL-
WAY COMPANY v. PUBLIC SERVICE COMMIS-
SION.

In Banc, July 22, 1921.

1. **RAILROAD CORPORATION: Issuance of Bonds: Property Right.** The provision of a railroad company's mortgage, covering all present and subsequently acquired properties, that, upon making future extensions and improvements, it could issue other bonds equal to eighty per cent of the value thereof, upon a showing that its net earnings for twelve months had been equal to twice the interest on its existing indebtedness, is a property right, and cannot be destroyed by any unreasonable subsequent legislation in the nature of a police regulation.
2. ———: ———: **Delayed by Failure to Earn Interest: Power of Public Service Commission: Mandamus.** Section 57 of the Public Service Act forbids the Public Service Commission from granting authority to a railroad corporation to issue bonds to cover expenditures that have been incurred more than "five years next prior to the filing of an application with the Commission for the required authorization." Relator had executed a mortgage upon all its existing and after-acquired properties, which contained a provision that it could thereafter issue bonds to the extent of eighty per cent of its subsequently acquired properties, extensions and betterments, upon a showing that its net earnings for the previous twelve months were equal to twice the interest on its existing indebtedness. The extensions and betterments had been made more than five years before it applied to the Commission for authority to issue bonds to the extent of eighty per cent of their value, but the application had been delayed because the earnings had not equalled twice the annual interest charges until a short time before the application was made, and the application was denied because it was not made within five years after the expenditures were incurred, and the company brings mandamus to compel the Commission to grant the authorization. *Held*, that the five-year limitation in the statute was an impairment of the company's contract right to issue the bonds, and for that reason unconstitutional and void, unless it can be sustained on the ground that it is a reasonable police regulation, and it can be sustained on that ground only when it is shown to be in the interest, protection and promotion of the public good;

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and the facts do not make it apparent that the public good will in any wise be promoted by withholding from the company authority to issue the bonds, and the Commission is commanded to approve their authorization.

Held, by DAVID E. BLAIR, J., dissenting, that, the statute being void, the Supreme Court has no authority, by mandamus or otherwise, to compel the Public Service Commission to approve the authorization nor could the Commission prohibit the company from issuing the bonds; the statute having been declared void in its application to the company, the Commission has no jurisdiction to further consider the subject.

Mandamus. .

WRIT GRANTED.

Clyde Taylor for relator.

(1) The five-year limitation provision, if applied to the mortgage contract in question, is unconstitutional, null and void and constitutes no defense for the failure of the Commission to grant the authority in reliance thereon because (a) such provision so applied impairs the obligations of the mortgage contract, and (b) deprives the company of its property, i. e., its vested right to issue these bonds and receive the proceeds thereof, without due process of law. The mortgage is a contract and the mutual rights thereunder rest in contract. 6 Ency. U. S. Supreme Court Reports 765, 782, 874; *Fletcher v. Peck*, 6 Cranch. 87, 137, 3 L. Ed. 178; *Green v. Biddle*, 8 Wheat. 1, 5 L. Ed. 547, 570; *Dartmouth College v. Woodward*, 4 Wheat. 518, 4 L. Ed. 629, 657; *Ogden v. Saunders*, 12 Wheat. 213, 316, 6 L. Ed. 606. But the so-called five-year provision of Section 57 of the Public Utility Act as applied by the Commission in this case limits, modifies and impairs such contract and the rights of the parties thereunder. (2) The constitutional inhibition is absolute and prohibits any impairment. 6 R. C. L. secs. 319 and 320, p. 329; *Curran v. Arkansas*, 15 How. 304, 14 L. Ed. 705; *McGahey v. Virginia*, 135 U.

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S. 662, 34 L. Ed. 314; *Louisiana v. New Orleans*, 102 U. S. 203, 26 L. Ed. 133; *Murray v. Charleston*, 96 U. S. 432, 24 L. Ed. 764; *Cleveland Railroad v. Pennsylvania*, 15 Wall. 300, 21 L. Ed. 187; *Green v. Biddle*, 8 Wheat. 1, 5 L. Ed. 568; *Schuster v. Weiss*, 114 Mo. 174; *Red Rock v. Henry*, 106 U. S. 596, 27 L. Ed. 251; *Public Service Com. v. Railroad*, 271 Mo. 266, 270. (3) Five-year limitation as applied by the Commission cannot be sustained upon the theory that it is an exercise of the state power pursuant to its reservation of authority to alter, amend or repeal charter provisions of a corporation. *Shields v. Ohio*, 95 U. S. 319, 24 L. Ed. 357; *Berea College v. Kentucky*, 211 U. S. 66, 53 L. Ed. 90; 7 *Fletcher Ency. Corp.*, p. 7596, sec. 4310; 7 *R. C. L.* sec. 94, p. 122; *Brenner v. Chicago St. Rys. Co.*, 246 Ill. 170, 138 Am. St. 233. (4) The five-year limitation as applied by the Commission cannot be sustained as a Statute of Limitations. *Stephens v. St. Louis Natl. Bank*, 43 Mo. 385, 388; *Cranor v. School District*, 151 Mo. 123; *Smith's Commentaries on Const. & Statutory Const.*, secs. 254, 265; *Tice v. Fleming*, 173 Mo. 55. (5) The five-year provision as applied by the Commission to the principles of this case cannot be sustained as a valid exercise of police power. *State ex rel. v. Stevens*, 197 N. Y. 1; *United States v. D. & H. Co.*, 213 U. S. 366; *Harriman v. I. C. C.*, 211 U. S. 411; 6 *R. C. L.* sec. 266, p. 236; *State v. Smith*, 233 Mo. 265; *State v. Fisher*, 52 Mo. 177; 17 *R. C. L.* 670, 676. (6) *Mandamus* is proper remedy. 18 *R. C. L.* 105, 106; *State ex rel. v. Turner*, 210 Mo. 77. (7) Writ should not be denied because concurrent remedy of appeal or other method of review. *State ex rel. v. Elkins*, 130 Mo. 109; *State ex rel. v. Spencer*, 166 Mo. 271; *Carter v. Bolster*, 122 Mo. App. 144; *State v. Aloe*, 152 Mo. 466; *State ex rel. v. Denton*, 128 Mo. App. 314; *Albridge v. Spears*, 101 Mo. 406; *St. Louis R. R. Co. v. St. Louis*, 92 Mo. 165; *State v. Equitable Co.*, 142 Mo. 337.

R. Perry Spencer, General Counsel, and *James D. Lindsay*, Assistant Counsel, for respondent.

(1) The Commission was without power to grant the application. By Section 54 of the Public Service Commission Law, Sec. 10463, R. S. 1919, it was declared that the power of railroad corporations to issue bonds and to create liens upon their property situated in this State "is a special privilege, the right of supervision, regulation, restriction and control of which is and shall continue to be vested in the State, and such power shall be exercised as provided by law and under such rules and regulations as the Commission may prescribe." The extent and manner of exercise of the power granted the Commission are specified in Section 57 of the Act, Sec. 10466, R. S. 1919. It is there provided that a railroad corporation or common carrier may issue bonds "payable at periods of more than twelve months after the date thereof," for the reimbursement of moneys actually expended from income, for acquisition, extensions, improvements and the like, except for maintenance of service and except for replacements, "within five years next prior to the filing of an application with the Commission for the required authorization" provided, there shall have been secured from the Commission an order authorizing such issue. (2) The fixing of the five year period is not entirely a Statute of Limitation of time, but it is also a limitation upon the power of the Commission, and this is so, even though it should be held that the limitation as to mere time in the statute cannot annul the contractual provisions of the mortgage. (3) If the contractual provisions in issue in the mortgage, applicable to the company and the bond-holders present and prospective, are of such a nature that they cannot be affected or controlled by a statute subsequently passed, which we deny; they cannot, in any event, confer upon the Commission a power which was denied to the Com-

mission by the Legislature. (4) The subjects confided to the Public Service Commission as a creature of the statute are defined by the statute creating it. Its power over those subjects is, in general, exclusive, but that power cannot be extended to other subjects than those enumerated, or exercised beyond the limits prescribed. *State ex rel. United Rys. v. Pub. Serv. Comm.*, 270 Mo. 429. (5) Relator is not entitled to a peremptory writ of mandamus. The writ of mandamus does not run unless the relator shows a clear right to the thing demanded and an imperative duty upon the respondent to perform the act required. The writ cannot confer power nor enlarge duty to act. 19 Am. & Eng. Ency. Law (2 Ed.) 725; 18 R. C. L. Mandamus, sec. 30; *State ex rel. Doud v. Lesueur*, 136 Mo. 452; *State ex rel. See v. Appling*, 191 Mo. App. 589; *State ex rel. Crandall v. McIntosh*, 205 Mo. 589. If, as seems clear, the Legislature did not give the Commission power to approve such an issue of bonds as is here under consideration, and did not provide that relator should have a statutory right of approval from the Commission of such bonds, then relator's prayer for the writ cannot be granted. The act, in its relation to the rights of relator, does not give the right here asserted, and in respect to the powers given the Commission, does not confer the power here sought to be set in motion.

WOODSON, J.—This is a proceeding by mandamus instituted in this court by the relator against the respondent to compel them to authorize the former to issue its bonds in the sum of \$278,000 as authorized by its first mortgage, dated March 1, 1910, to be more fully mentioned later.

The facts of the case are undisputed, and appear from the petition for the writ, and the return thereto, which is a demurrer, to be substantially as follows:

The company has the contract right, by the terms of the mortgage mentioned, to issue these bonds on ac-

count of additions and extensions to and of its property made since the date of the mortgage and to sell the same and receive the proceeds thereof. That mortgage was upon all of the property of the company then existing or thereafter acquired. By its terms, the company could not create another first lien upon property thereafter acquired and borrow money by reason thereof, having disabled itself from so doing by reason of the after-acquired property clause, by the terms of which the mortgage covered not only all property in existence at its date but also all thereafter acquired. Hence, it was provided that the company should have the right to borrow money by way of additional first mortgage bonds on a parity with those already issued to the extent of eighty per cent of the value of the property acquired by the company subsequent to the date of the mortgage. It was further provided in this mortgage that after the expenditures were made the company should not issue bonds on account thereof unless and until the company could show that its net earnings, for twelve months preceding the issuance, were equal to twice its interest charges. The company was unable to make such showing as to interest, and hence unable to exercise the right to issue these bonds, until shortly before the date of its application to the Commission. In other words, the company made its application as soon as it was entitled under the terms of its mortgage to issue the bonds. The provisions of the company's first mortgage enabling it to issue these additional bonds constituted a property right springing from the contract.

Application was duly made to the Commission for the requisite authority to issue these bonds. A hearing was regularly held and the authority denied. The Commission found and declared that: (a) the company was given the right by the mortgage to issue the bonds; (b) it had actually made the additions to property claimed; (c) had complied in all respects with the terms of the mortgage contract to be performed by it as a condition

to such issuance; (d) was entitled under the law and facts to be authorized by the Commission to make such issue, and the Commission should and would authorize the same, save and except only for the fact that a part of the expenditures occurred more than five years prior to the application to the Commission for such authority, and that the Commission was prohibited by the provisions of Section 57 of the Act from authorizing the issuance of bonds for additions made more than five years previous to the application.

The company was not remiss in failing to apply for authority to issue these bonds within five years after the expenditures. As stated, it could, under the mortgage, issue additional bonds only when it could show net earnings double the interest charges. This showing it could not make previous to the date of the application. This fact is pleaded and is, of course, admitted by the demurrer.

The Commission held that it was prohibited by a provision of Section 57 of the Public Service Commission Act from granting such authority where such expenditures have occurred more than "five years next prior to the filing of an application with the Commission for the required authorization."

Under these circumstances it is contended that in the event that such quoted provision is not applicable or for any reason is void, then the Commission, having found that but therefor it should and would grant the authorization, the company is entitled to have the Commission compelled to grant the authority as a mere ministerial act.

The first contention of counsel for relator is stated in the following language:

"The five-year limitation provision, if applied to the mortgage contract in question, is unconstitutional, null and void and constitutes no defense for the failure of the Commission to grant the authority in reliance thereon because (a) such provision so applied impairs the obligations of the mortgage contract, and (b) de-

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prives the company of its property, i. e., its vested right to issue these bonds and receive the proceeds thereof, without due process of law.

“There can be no question but what the mutual rights of the parties as stated in the mortgage are protected by Section 10 of Article I of the Constitution of the United States, which provides, among other things, that ‘no State shall . . . pass any law . . . impairing the obligations of a contract.’ The rulings of the Supreme Court of the United States are all one way upon that subject. [6 Ency. U. S. Sup. Ct. Reports, 765, 782, 874; *Fletcher v. Peck*, 6 Cranch. 87, 137, 3 L. Ed. 162, 178; *Green v. Biddle*, 8 Wheat. 1, 5 L. Ed. 547, 570; *Dartmouth College v. Woodward*, 4 Wheat. 518, 4 L. Ed. 629, 657, 663; *Ogden v. Saunders*, 12 Wheat. 213, 316, 6 L. Ed. 606.]”

There cannot be any doubt but what the five-year limitation of the Public Service Commission's right to authorize the issue of the bonds in question is an impairment of the company's contract right to issue the bonds in question, and for that reason is unconstitutional and void, without such limitation can be sustained upon the ground that it is a reasonable police regulation.

That the State under its police power, within reasonable limitation, has the authority to regulate or prohibit the issuance of bonds secured by mortgage upon the properties of public service corporations goes without saying, but that does not mean that the State has the absolute arbitrary right or power to so do, for five years or for any other period of time, unless it appears that the exercise of such authority is in the interest, protection or promotion of the public good, defined by the State and Federal courts, but not otherwise. [*State v. Smith*, 233 Mo. 242, 1. c. 265; *State v. Fisher*, 52 Mo. 174, 1. c. 177; *United States v. D. & H. Co.*, 213 U. S. 366; *Harriman v. Interstate Comm.*, 211 U. S. 411.]

From the facts in this case it does not appear that the public good will in any way be served by withholding

from the company the authority to issue the bonds mentioned, but it is inferable, at least, that the public good will be promoted and served by their issuance, because it is always beneficial to the public interest that the railroads of the country should be maintained and improvements made in the way of betterments, which the facts in this case show was the design, to pay for improvements made by the company.

For the reasons stated we are of the opinion that the alternative writ heretofore issued should be made permanent. It is so ordered. All concur, *David E. Blair, J.*, in separate opinion; *James T. Blair, C. J.*, not sitting.

DAVID E. BLAIR, J. (concurring).—I agree that Section 57 of the Public Service Commission Act is unconstitutional in so far as it affects the rights of relator to issue bonds under its mortgage issued before the passage of such act and that no considerations based upon the police power of the State make such act valid as to such mortgage.

I fear the language used in the majority opinion may be regarded as holding that said Section 57 is unconstitutional and void in fixing a five-year limitation for the approval of bonds authorized by mortgages on the property of public utilities, even though such mortgages are executed subsequent to the passage of the Public Service Commission Act. That question is not involved in this case.

For the reason stated I concur in the result.

ON MOTION FOR REHEARING.

DAVID E. BLAIR, J.—The record shows my concurrence in a separate opinion in the result reached in the majority opinion in this case. When the motion for rehearing was passed on I had concluded that I was in error in concurring in the result and voted to sustain the motion for rehearing, and as no opinion was written in support of the court's action in overruling the motion

for rehearing I feel constrained to state my reasons for favoring such rehearing.

The majority opinion holds and the order entered requires that respondent must approve bonds issued or to be issued under the terms of relator's first mortgages to reimburse relator for certain expenditures made more than five years prior to the date of the application filed with respondent for authority to issue same.

The Legislature has not empowered respondent to approve bond issues for expenditures for such improvements completed more than five years before the date of the application. Respondent has no powers not conferred upon it by the Legislature and this court has no power by judicial action to extend or broaden those powers and should not undertake to compel respondent to perform any act it is not empowered by the Legislature to perform.

The Legislature attempted to provide a period of grace for the approval of bonds issued to reimburse railroads for money expended out of income for certain proper purposes prior to five years before the filing of the application, if such application be filed before January 1, 1914. [Sec. 10466, R. S. 1919.] Relator was prohibited by the very terms of its mortgage and the state of its earnings from taking advantage of such period of grace. Of course, the Public Service Commission Act could not thus ruthlessly cut off relator's right to issue bonds provided for by its first mortgage antedating such enactment. Such legislation is violative of our Constitution as an impairment of existing contracts.

I think we should have denied the permanent writ, and held the issue of bonds sought by relator to be valid under the peculiar circumstances here existing without application to or order from respondent.

For these reasons, I desire to withdraw my separate concurring opinion, and to be noted as dissenting to the majority opinion, and also marked as dissenting to the action of my brethren in overruling respondent's motion for rehearing.

COCOA COLA BOTTLING COMPANY et al., Appellants, v. THOMAS SPEED MOSBY, State Beverage Inspector.

In Banc, July 22, 1921.

1. **CONSTITUTIONAL LAW: Deceptive Words.** A legislative act is not made an inspection law by the frequent use of the word inspection; mere words do not determine its character, but that is to be ascertained from the language employed, the legislative intention indicated by such language, and the object and purpose of the act considered as a whole.
2. ———: **Carbonated Waters: Grounds for Inspection.** The extensive manufacture and general use of carbonated waters, commonly known as "soft drinks," and other like preparations having no merit other than the creation of a pleasant but fleeting gustatory sensation, are the moving cause of legislation providing for their inspection.
3. ———: **Police Regulation: An Inherent Legislative Power.** The police power is inherent in the State as a sovereignty, and needs no organic grant for its exercise by appropriate legislation. It can always be used in the interest of the general welfare to restrain one man from so using his property as to injure another.
4. ———: ———: **Inspection Laws: Police Regulation.** Laws providing for the inspection of foods and drinks, if they relate to the purity of the article inspected and are designed to promote the public health by prohibiting the use of deleterious substances in their preparation, are the exercise of the police power. A prohibition may be placed by law upon the making and sale of any article deleterious to the user, and that may be accomplished by a reasonable inspection law.
5. ———: ———: **Inspection or Revenue Act: Provisions.** An act providing for the inspection of carbonated waters which defines the duties of an official who is charged with its execution, provides specifically for the products to be inspected, prohibits the manufacture and sale of such products as are not pure and wholesome, requires samples of such products to be submitted for inspection, requires labels showing the nature of the beverage and that it has been inspected as to character and purity to be placed upon all packages, prescribes a penalty for the misuse of the labels and for the failure of the inspector to perform his duties,

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prescribes the fees for inspection and directs that records of the inspection work shall be kept, is an inspection measure, whose purpose is to promote the public health, and, unless it can be shown that its operation is onerous and the result of its enforcement alien to the purpose of its enactment, will not be held to be a mere revenue measure, but a reasonable exercise of the police power.

6. ———: **Title: Inspection Law.** The title to an inspection law need not expressly show that it is not a revenue measure. Section 28 of Article 4 of the Constitution does not require that the title of an act shall particularize the items it contains or does not contain. It simply means that the title shall unmistakably indicate the contents of the act.
7. ———: **Inspection: By Sample.** Inspection of carbonated waters by sample, instead of the entire product, does not render the law invalid as a police regulation.
8. ———: ———: **No Penalty for Manufacture.** An inspection law which affixes a penalty to the sale of an article unless it has been inspected and labeled is not invalid because it prescribes no penalty for the manufacture of impure products. It is the sale of impure products that the law strikes at, for it is by their sale that injury to the public is made effective.
9. ———: ———: **Excessive Fees: Revenue Measure.** Inspection fees are not restricted to the mere expense of the inspection. It is impossible for the Legislature, in enacting an inspection law, to determine the exact expense of its execution or to nicely gauge the charge that should be required. What is a reasonable fee depends largely upon the sound discretion of the Legislature. An inspection law will not be held to be a revenue measure merely because in the first years of its operation the fees collected amount to more than three times the expenses; especially should this be the ruling where the Legislature, after discovering such excess, made very substantial reductions in the fees to be thereafter charged.
10. ———: ———: ———: **Presumption of Legislative Reduction.** An inspection law being otherwise valid and the amount of the fees to be charged being largely within the sound discretion of the Legislature, the presumption is that the Legislature, upon discovering that the fees authorized to be charged and collected largely exceed the probable costs of inspection, will reduce the fees, and the courts do not interfere, immediately upon application, upon a showing that the fees collected for the first two years after the enactment of the law largely exceeded the expense.

Appeal from Cole Circuit Court.—*Hon. J. G. Slate,*
Judge.

AFFIRMED.

Phillips W. Moss for appellants.

This act is a revenue measure, and as such violates the Constitution of Missouri as follows: (1) Section 20, Article IV, in that the fact that it is a revenue measure is not clearly stated in its title. (2) Section 3, Article X, in that the tax levied under the provision of said act is not uniform upon the same classes of subjects within the territorial limits of the State. (3) Section 4, Article X, in that all property in the State subject to the tax imposed is not taxed in proportion to its value. (4) Section 7, Article X, in that Section 9 of said act exempts beverages manufactured in this State and exported outside of the State for sale. (5) Section 8, Article X, in that it undertakes to tax property at a rate excessive of the rate therein established. *City of Brookfield v. Touhey*, 146 Mo. 719; *State v. Stevens*, 146 Mo. 662; *State v. Bixman*, 162 Mo. 1; *State v. Bengsch*, 170 Mo. 81; *Welton v. State*, 81 U. S. 275; *State v. Spiegel*, 75 Mo. 145; *City v. Weitzel*, 130 Mo. 600.

Jesse W. Barrett, Attorney-General, and *Merrill E. Otis*, Assistant Attorney-General, for respondent.

(1) The argument that the soft drinks inspection law of 1919 is unconstitutional is based on the contention that that law is not what it purports and declares itself to be, namely, an inspection measure, but that in reality it was intended to be and that it is a revenue measure, "masquerading under the guise of an inspection law." It is, however, an inspection measure and, therefore, within the constitutional power of the Legislature to enact. Inspection laws are a proper exercise of the police powers of the state and the cost thereof may legally be assessed against the owners and producers of the things inspected. (2) Courts will not

arrive at the conclusion that the Legislature has attempted to make the right to exact inspection fees a cover for imposing a tax for general revenue purposes until compelled to do so. Good faith and honesty on the part of the Legislature is presumed. *Willis v. Standard Oil Co.*, 50 Minn. 290, 1. c. 297; *State ex rel. v. Ross*, 166 Pac. 505. (3) What is a reasonable fee for inspection must depend largely upon the sound discretion of the Legislature, having reference to all the circumstances and necessities of the case, and unless it is manifestly unreasonable in view of the purpose of the law as a police regulation, the court will not adjudge it a tax. *McLean v. D. & R. G. Railroad*, 203 U. S. 38; *Foote & Co. v. Maryland*, 232 U. S. 494; *Wadhams Oil Co. v. Tracy*, 141 Wis. 150, 123 N. W. 785. (4) So long as an inspection fee is not so much in excess of what appears to be reasonably required for inspection as to make it appear to be an act designed for revenue instead of regulation, it presents no judicial question. 22 Cyc. 1365, note; *State ex rel. v. Ross*, 166 Pac. 505; *People v. Harper*, 91 Ill. 357; *Willis v. Standard Oil Co.*, 50 Minn. 290, 52 N. W. 652; *Territory v. D. & R. G. Railroad*, 78 Pac. 74; *Patapsco Guano Co. v. Board of Agriculture*, 171 U. S. 345. (5) If the amount of money raised by an inspection system proves to be larger than is required for the purpose, it is to be presumed that the Legislature will decrease the charge. In the instant case the Legislature reduced the charge at the first opportunity, after a tryout of the law. *Patapsco Guano Co. v. North Carolina*, 171 U. S. 345; *Red C Oil Co. v. North Carolina*, 222 U. S. 380. (6) Owing to the varying fluctuations of trade it is manifestly impossible for the Legislature to determine with exact nicety the amount of inspection charges required to carry its purposes into execution. Mere excess in net surplus revenues is of itself no warrant for disturbing the law nor would even a flagrant excess in a single year invalidate it. *Castle v. Mason*, 91 Ohio St. 296. (7) The disproportion-

tion between the amount of fees collected under a statute purporting to be an inspection measure and the expenses incurred in its execution will justify a court in holding it to be invalid only when one of two conditions is met: Either the discrepancy must be so great that the court is forced to the conclusion that the Legislature in the first instance acted in bad faith, and intended to provide a revenue under the pretext of requiring an inspection, or else the Legislature must have neglected an opportunity to revise the charges exacted, after experience had shown those previously imposed to be excessive. *State ex rel. v. Ross*, 166 Pac. 505. (8) Appellants rely upon the dissenting opinion in *State v. Bixman*, 162 Mo. 41. Even that dissenting opinion, however, gives no support to the contention of appellants. The facts of that case and of the instant case are wholly dissimilar. Here we have a law that in the first seventeen months of its existence has produced three times the cost of administration, whereupon the Legislature, at the first opportunity, has reduced the rate, but in the *Bixman* case it was shown that the beer inspection law produced annually forty-five times the cost of inspection and there was no indication of legislative intention to reduce the rate. *State v. Bixman*, 162 Mo. 58. (9) That an inspection law may legally exempt from inspection fees goods exported from the State has been expressly upheld in this State. *State v. Bixman*, 162 Mo. 39.

WALKER, J.—This is a suit in equity, brought in the Circuit Court of Cole County, by certain incorporated companies engaged in the compounding and sale of what, in common parlance, are termed "soft drinks." The purpose of the action is to restrain the State Beverage Inspector from enforcing the provisions of an act approved April 25, 1919 (*Laws 1919*, p. 379), providing for the inspection of non-intoxicating carbonated beverages, and syrups, extracts and flavors used in the preparation

of same, requiring a monthly report of sales and the payment of fees by the manufacturers of those products, for inspection services and prescribing penalties for violations of the act. It is contended that the act is unconstitutional and hence void. Upon a hearing before the circuit court, there was a finding for the defendant, the injunction was denied, the petition dismissed, and an appeal perfected to this court.

Aside from the formal admission as to the corporate existence and the nature of the business of each of the plaintiffs, and the official character of the defendant, it was conceded, in an agreed statement of facts, that defendant had required plaintiffs to file monthly reports and pay fees upon their respective sales, based upon the rates fixed by said act; that during the period from April 25, 1919, to September 20, 1920, defendant had collected in fees from all sources under said act, \$360,054.85, of which sum \$90,318.01 was received from bottlers of soda water, and the remainder from manufacturers of other non-intoxicating beverages and from soda fountains. That the total expense of said defendant's office during the time stated was \$98,084.51. That during said time, chemical and bacteriological analyses were made in the laboratory of said defendant, of samples of the beverages compounded by plaintiffs and others engaged in a like business; and, in addition, a personal inspection was made of the places where such beverages were manufactured or sold in this State, upon an average of about once per month; that the value of the products of these plaintiffs and the price at which they are sold is from thirty-six to eighty cents per gallon; that the value of the products of other manufacturers of like products is from twenty-eight cents to one dollar per gallon.

I. The contention of the plaintiffs is that this act is a revenue, rather than an inspection measure, and consequently void, and that the word "inspection," wherever used therein, is but a subterfuge to conceal the

Inspection:
Police
Regulation.

real purpose, and free the act from the restrictions of the Constitution which, if applied to a revenue measure, would render it inoperative. Mere words will not, of course, suffice to determine the character of a legislative act; they are but milestones measuring the distance and marking the way to the goal of true meaning in all journeys of interpretation. Despite the frequency, therefore, of the use of any particular words in an act which, if properly used, are indicative of its character, its meaning and purpose are to be determined by an application of the tests recognized by the canons of construction. Among these tests of more than minor importance and perhaps sufficient within themselves to solve the question confronting us, may be mentioned the language employed, the intention of the Legislature as indicated by that language and the object and purpose of the act when construed as a whole. Novel preparations of both foods and drinks are constantly increasing in quantity and variety, often alluring in name, and uniformly, whether justly or not, emblazoned with the hallmark of merit by the ingenious advertiser; their distribution soon becomes wide-spread, their reputed merits familiar and their consumption general. Illustrative of this fact are the myriad forms of so called breakfast foods, the nomenclature of which has well-nigh exhausted human fancy, and whose health giving properties, measured by the modest claims of their makers, equal, if they do not excel, the magical effect of the waters of the padre's spring of San Joaquin, concerning the virtues of which Bret Harte charmingly invokes the aid of the Muse.

Another illustration more pertinent to the matter at issue is to be found in the carbonated waters and their concomitants now so extensively manufactured and generally used, that they no longer require the aid of printer's ink to promote their sale. Consisting simply of water charged with carbon dioxide to which is added an acid to create effervescence and flavored oftenest to simulate a fruit or herb whose parent stem was probably

the alembic of a laboratory, and making no claim to merit other than the creation of a pleasant, but fleeting gustatory sensation, the extensive manufacture and general use of preparations of this character are akin to the remarkable. An English curate after having met Lord Chesterfield, was asked what he thought of him. He said he might be lacking in many virtues, but "he certainly left a pleasant taste in one's mouth." This, at least may be said of what we familiarly call soda water and other soft drinks, which sparkling like the vintages of Champagne and Moselle, tickle the palate, but here the simile ceases. These observations, casually considered, might seem to indicate a wandering afield. But not so. The fact that these and other preparations, especially those intended for food or drink, are so extensively made and so generally used, is the moving cause of legislation of the character here under review. In short, it is but another illustration of the exercise of the police power, inherent in the State as a sovereignty, needing no organic grant for its existence and demanding legislative aid only to give it form and provide a procedure for its operation. Many attempts have been made to define this power, the most comprehensive of which perhaps is that of Judge Cooley (q. v., *Cooley's Con. Lim.* (7 Ed.) p. 289). It is not necessary to quote it here on account of its length. It will answer our purpose to say that by means of this power the Legislature exercises supervision over matters involving the public welfare and enforces the observance by each individual, of the duties he owes to others and to the community at large. The motto of this State that the will of the people is the supreme law, is one of the fundamental principles involved in the exercise of the police power. Another upon which the power to a large extent rests is the maxim that you must so use your own as to not injure the rights of others. It is said that nearly every problem involved in the exercise of the police power finds its solution in the application of the principle embodied in this maxim. [6 R. C. L. p. 188, sec. 186; *Sings v.*

Joliet, 237 Ill. 300; 127 Am. St. 323, 22 L. R. A. (N. S.) 1128; Karasek v. Peier, 22 Wash. 419, 50 L. R. A. 345.] That inspection laws are within the sphere of the State's authority, in its exercise of the police power, is as clear as the power of Congress to establish regulations of commerce. [Foster v. New Orleans, 94 U. S. 245, 24 U. S. (Law Ed.) 122; Mayor of New York v. Miln, 11 Pet. 102, 9 U. S. (Law Ed.) 648; Armour & Co. v. Augusta, 134 Ga. 178, 27 L. R. A. (N. S.) 676.] This is true because inspection, especially of foods or drinks, concerns itself with the purity of the article inspected and hence is promotive of health in prohibiting the use of deleterious products. In the restrictions which follow the enforcement of inspection laws, we discern the application of the maxim above referred to, viz., "*Sic utere tuo*," etc, in that, regardless of the manner in which you use your own, whether it be as an individual, or as a manufacturer producing commercially an article for sale, that use must be such as to not injure the user. In other words, a prohibition may be placed by law upon the making and sale of any article deleterious to the user, as in the case of impure articles of food or drink. There remains, therefore, nothing upon which the contention can rest that laws of the nature of that under review, may not be enacted and enforced, subject, of course, to such restrictions as the Constitution has placed upon laws generally, as to reasonableness within which is included all of the objections urged by the plaintiffs against the validity of this enactment.

II. Preliminary to the consideration of these constitutional questions, let us examine the language of the act to determine therefrom its character, viz., whether it is to be classified as an inspection or a revenue measure.

Reasonable Law. It provides for and defines the duties of an official who is charged with the execution of its provisions; it prescribes specifically the products to be inspected; it prohibits the manufacture and sale of such products if not pure and wholesome;

it requires samples of such products to be submitted for inspection by manufacturers and requires sellers of products not manufactured in this State to file affidavits of the manufacturers with the inspector that he may determine the purity of the products; and requires the inspection of such products; it prescribes the fees for inspection; directs the keeping of records of the inspector's work, of the fees collected by him and how reported and accounted for. Labels showing the nature of the beverage and that it has been inspected as to its character and purity are required to be placed upon all packages of same—a penalty being prescribed for a violation of this duty. Beverages manufactured in this State, but to be shipped out of it and sold elsewhere are to be inspected free to the manufacturers. Certificates of inspection and labels are to be prepared and kept by the State Treasurer to be delivered and charged to the inspector who shall keep a record of and account for same to the Treasurer. A penalty is prescribed for the misuse of certificates and labels. Likewise a penalty is fixed for a failure by the inspector to perform his duties. Other provisions embody matters of procedure not necessary to be set forth here. From the foregoing epitome, the conclusion is inevitable that so far as the subject-matter is concerned, this act, if words are to be read with their usual meaning, can not be otherwise construed than as an inspection measure. Thus classified and defined, it follows as a necessary consequence that such was the intention of the Legislature in its enactment; and that the object and purpose of the acts, as we have indicated in discussing general legislation of this character, was the public good, in that it tends to prevent fraud in the making of the products, is promotive of their purity and hence helpful to health. As a result of this conclusion, unless it can be shown that the operation of the act is onerous and the result of its enforcement alien to the purpose of its enactment, it will stand the test of judicial interpretation. [Lawrence v. Monroe, 44 Kan. 607, 10 L. R. A. 520; Bradford v. Jones, 142 Ky. 820; Parker v. Griffith, 151

N. C. 600; State v. Fargo Bottling Works, 124 N. W. 387; State v. Danenberg, 151 N. C. 718; Sawyer v. Botti, 124 N. W. 787; Comm. v. Henry, 65 S. E. 570, 26 L. R. A. (N. S.) 883.]

III. To these limitations let us give attention in the order in which they are urged by counsel for the plaintiffs.

Before considering other matters, there is one relating to the form of the act which merits attention. It is contended that the title of the act insufficiently indicates its character, or more concretely, that it should show *in haec verba* that it is not a revenue measure. Without more ado, let the title itself answer this objection. It declares it to be "an act providing for and relating to the inspection of all non-intoxicating and carbonated beverages and so-called soft drinks, by whatever name called, also syrups, extracts and flavors of all kinds intended for use in the preparation and concoction of soft drinks," etc. Read even cursorily, the merest tyro cannot mistake the meaning of these words. So clearly do they define the object of the act that an attempt to explain them ends only in redundancy and possible confusion.

The State Constitution (Sec. 28, Art. 4) is read to little purpose if it be held to require that the title of an act must present the particularity of an itemized account or the minutiae of a chemical analysis. When the Constitution provides, therefore, that "no bill . . . shall contain more than one subject which shall be clearly expressed in its title," it simply means that the title shall indicate in an unmistakable manner the general contents of the act; it does not require, nor was it intended that it should descend into particulars, but that it will be sufficient if it defines the nature of the statute and thus informs the reader as to its purpose. The nature of this constitutional provision being thus understood, the tendency of the Courts in numerous rulings has been to construe it liberally in aid of all well directed

legislative power. [State ex rel. v. Guinotte, 275 Mo. 298; Booth v. Scott, 205 S. W. (Mo.) 633; State ex rel. v. Roach, 258 Mo. 541; State ex rel. v. Drabelle, 258 Mo. 568; Burge v. Railroad, 244 Mo. 76; State v. Hanson, 234 Mo. 583.] There is no merit in this contention.

IV. The provision for the inspection of samples, instead of the entire product, it is contended, constitutes a subterfuge which renders the act inutile as an exercise of the police power and consequently invalid. A like contention was made in the Bixman Case, 162 Mo. l. c. 34, in which the statute authorizing the inspection of beer was under review; in recognition of the beneficent purpose of the law and to further its object, the court construed it liberally and held that the inspector might take a sample at random from the various cases, or go directly to the brewery and take a sample of the mash from the vats in making his tests. The reason for this ruling is apparent. It accomplishes the purpose of the act with a minimum amount of trouble and expense to the owner of the product inspected. Any other course would prove tedious, expensive and impracticable. Inspection by sample is authorized and has been satisfactorily practised for many years in this State in the regulation of the sale of grain, milk and other food products. This course has received legislative authority and judicial recognition elsewhere and we fail to find any contention that it has not proved effective, or that it is counter to any constitutional provisions. [State v. Dupaquier, 46 La. Ann. 577, 26 L. R. A. 162; Comm. v. Carter, 132 Mass. 12.]

V. The validity of the act is assailed on the ground that no penalty is prescribed for the manufacture of impure, unclean and unwholesome products. This objection is purely finical. The purpose of the law is not to regulate the manufacture, but the sale of impure products. Lacking this

**Inspection
of Samples.**

**Penalty for
Manufacture.**

requisite, the validity of the act as an exercise of the police power might well be questioned. In what manner can the use of these products prove injurious, within the meaning of the maxim, "*Sic utere*," etc., unless they are dispensed or disposed of to others or, in a word, sold? As a condition precedent to their sale, it is required that they be inspected and for a failure to comply with this requirement the seller subjects himself to a penalty. So far, therefore, as the effectiveness of the act, or the furtherance of its purpose is concerned, it in no wise affects its validity that it contains a provision prohibiting the use of deleterious substances in the products included, but attaches no penalty to its violation.

VI. Passing without considering other constitutional provisions relied upon by the plaintiffs as having been violated in the enactment of this act and which cease to be centers of contention unless this be a revenue measure,

**Excessive
Fees.**

we come to the question of the amount of the fees for inspection as indicative of the character of the act. Waiving, as it were, all other grounds of attack, counsel contend that the gross amount of the fees collected for inspection is such as to fix beyond a peradventure the character of the act as a revenue measure. If the amount alone of the fees collected during the term stated, sufficed for this purpose, the contention might be conceded without further controversy. It does not, however. As we said in effect in the Bixman Case, *supra*: "Under no circumstances are inspection fees restricted to the mere expense of the act of inspection." It is the tendency and not improperly so, of legislature to require the subject inspected to bear the expense of same. If it happens, as is not infrequently the case, that the amount of the fees is in excess of the expense incurred in the performance of the services, this will not of itself destroy the character of the act as an inspection measure. Especially if it appears as it does here, that the Legislature, upon ascertain-

ing the amount of the excess, reduced the fees as applied to future inspections. By an act adopted in 1921, the fee for the inspection of soft drinks was reduced from $1\frac{1}{2}$ cents to three-fifths of one cent per gallon, and on syrups, flavors, etc., from ten cents to five cents per gallon. [Laws 1919, p. 381; Laws 1921, p. 402.] It is impossible for a legislature in the enactment of a law authorizing the collection of fees in its enforcement, to determine the exact expense of its operation and nicely gauge the measure of the charge which should be required. The courts cognizant of this difficulty hold that what is a reasonable fee must depend largely upon the sound discretion of the Legislature. If the fee fixed proves excessive, this will not of itself render the law invalid, as it will be presumed that the Legislature upon ascertaining the fact of the excess will remedy the defect.

A recent ruling of a court of last resort upon this subject will be found in *State ex rel. Brewster v. Ross*, 166 Pac. (Kan.) 505, in which it is shown that during the first two years of the operation of the statute, there under review, the fees collected for inspection were nearly four times the expenses incurred. The Supreme Court of Kansas, in the discussion and determination of this question, said: "The mere fact that the fees charged under such a statute exceed the expense of its execution is not enough to render it invalid. For instance, the difference between an income of from \$70,000 to \$75,000, and an outlay of from \$55,000 to \$60,000, has been said by this court not to afford a sufficient basis for avoiding such a statute. [*State ex rel. v. Railway Co.*, 87 Kan. 348, 365, 125 Pac. 98.] To have that effect one of two conditions must be met: Either the discrepancy must be so great that the court is forced to the conclusion that the Legislature in the first instance acted in bad faith and intended to produce a revenue under the pretext of requiring an inspection, or else the lawmaking body must have neglected an opportunity to revise the

charges exacted after experience had demonstrated beyond controversy that as previously imposed they were unreasonably and unnecessarily high. These principles are too well established to require extended discussion, but a brief reference will be made to the decisions on the subject. In a case involving the validity of a state law imposing a charge of twenty-five cents per ton upon fertilizers to cover the cost of inspection, interstate commerce being incidentally affected, it was said by the United States Supreme Court: 'Entertaining these views of the legislative intention, it does not appear to us that evidence tending to show that money collected from this source was applied to other than the purposes for which it was received should be entered into on this inquiry into the validity of the act. If the receipts are found to average largely more than enough to pay the expenses, the presumption would be that the Legislature would moderate the charge. But, treating the question whether the charge of twenty-five cents per ton was shown to be so excessive as to demonstrate a purpose other than that which the law declared, as a judicial question, we are satisfied that comparing the receipts from this charge with the necessary expenses, such as the cost of analyses, the salaries of inspectors, the cost of tags, express charges, miscellaneous expenses of the department in this connection, and so on, we cannot conclude that the charge is so seriously in excess of what is necessary for the objects designed to be effected, as to justify the imputation of bad faith and change the character of the act.' [Patapsco Guano Co. v. Bd. of Agriculture, 171 U. S. 345, 1. c. 354, 18 Sup. Ct. 862, 865, 43 L. Ed. 191.]"

Expressions of other courts of last resort are to the same general effect, as follows: "The law being otherwise valid, the amount of the inspection fee is not a judicial question; it rests with the Legislature to fix the amount, and it can only present a valid objection when it is shown that it is so unreasonable and disproportion-

ate to the services rendered as to attack the good faith of the law." [McLean v. Denver & Rio Grande R. R. Co., 203 U. S. 1. c. 55, 27 Sup. Ct. 1. c. 5, 51 L. Ed. 78.]

"If the trial made of the act establishes the facts to be as asserted, that the exaction in question is excessive, the presumption is that, in the orderly conduct of the public business of the State, the necessary correction will be made to cause the act to conform to the authority possessed, which is to impose a fee solely to recompense the State for the expenses properly incurred in enforcing the authorized inspection." [Oil Co. v. Bd. of Agriculture, 222 U. S. 380, 32 Sup. Ct. 152, 56 L. Ed. 240.]

"Inspection necessarily involves expense and the power to fix the fee, to cover that expense, is left primarily to the Legislature which must exercise discretion in determining the amount to be charged, since it is impossible to tell exactly how much will be realized under the future operations of any law. Besides, receipts and disbursements may so vary from time to time that the surplus of one year may be needed to supply the deficiency of another. If, therefore, the fee exceed cost by a sum not unreasonable, no question can arise as to the validity of the tax so far as the amount of the charge is concerned. And even if it appears that the sum collected is beyond what is needed for inspection expenses, the courts do not interfere, immediately on application, because of the presumption that the Legislature will reduce the fees to a proper sum." [Foote & Co. v. Stanley, 232 U. S. 949, 34 Sup. Ct. 377, 57 L. Ed. 698.]

"It is not necessary that the Legislature determine with exact nicety the amount of the inspection charges required to carry its purpose into execution. This is manifestly impossible owing to the varying fluctuations of trade. Mere excess in net surplus revenues is of itself no warrant in disturbing the law, nor would we feel disposed to hold that a flagrant excess in a single year over the expenses would invalidate it. What we do hold is, that under the facts disclosed here, where it appears

that the fees are not only excessive, but are being continued, yielding each and every year increasing net revenues, the natural operative effect of the inspection act thus shown is in direct violation of Article 1, Section 10, of the United States Constitution, and consequently void." [Castle v. Mason, 91 Ohio St. 296, 110 N. E. 463, Ann. Cas. 1917A, 164.]

As we have shown, the objections urged to the law as considered by the Supreme Court of Ohio, in the Castle-Mason case, are met by the amendment in 1921 of the act here under review.

If the Legislature of this State had not enacted the amendment of 1921, *supra*, and in all other respects the act had possessed, as we have shown it does, the form and features of an inspection measure, this would not authorize a holding as to its invalidity, because of the presumption that the Legislature will reduce the fees upon acquiring a knowledge of their excess, to a sum more nearly necessary to the expenses of inspection. [State v. Standard Oil Co., 161 N. W. (Neb.) 537, L. R. A. 1917D, 746; State v. Bartles Oil Co., 132 Minn. 138, L. R. A. 1916D, 193; Lee Co. v. Webster, 190 Fed. 353.]

While we have examined the other objections urged by counsel for plaintiffs, we have not deemed it necessary to formally discuss them in view of our expressed conclusion as to the validity of the act.

The judgment of the trial court is, therefore, affirmed. All concur.

THE STATE ex rel. ST. LOUIS - SAN FRANCISCO
RAILWAY COMPANY v. GEORGE D. REY-
NOLDS et al., Judges of St. Louis Court of Appeals.

In Banc, July 22, 1921.

1. **CERTIORARI: To Court of Appeals: Evidentiary Facts.** In *certiorari* to a court of appeals based on conflict with prior decisions, the Supreme Court takes the evidentiary facts stated in the opinion of the Court of Appeals as the facts of the case. Where it is stated in said opinion that "there was evidence tending to show that the speed of the train was not slackened until after deceased was struck" the Supreme Court will assume that said statement is true, although an examination of the testimony might weaken the conclusions of law reached by that court.
2. **NEGLIGENCE: Crossing Railroad: Danger Zone: Humanitarian Rule.** The railroad ran east and west, and for about a half mile west of the station the double tracks were straight; north of them was the station house or waiting room, and south of them was a platform where passengers boarded east-bound trains; deceased, two other ladies and two children were in the station awaiting the arrival of a local train, due to stop at 9:45 a. m., but late; at about ten o'clock a through-passenger train, not scheduled to stop at the station and running several hours late and at the rate of forty-five miles per hour, approached from the west, and hearing its whistle these five persons, supposing it to be the local train, left the station and started across the tracks for the platform, and two of the women and the two children got across, but deceased, who was just behind the others, was struck just as she stepped off the south rail of the south track; a second or two more and she would have reached a place of safety. When the train was 1320 feet west of the station, the engineer saw this group of five persons leave the station and start across the tracks, and realizing they were attempting to cross he gave the brakes a "service application," which is the ordinary method of stopping a train as distinguished from an "emergency application," which slows up and stops it more quickly and which, if it had been given, would have stopped the train within the 1320 feet. The acts of the parties indicated to the engineer that they knew the train was approaching, which carried with it knowledge of the fact that it was

approaching very rapidly. *Held*, that the engineer had a right to assume that deceased would stop before entering upon the south track, and the five persons were not passengers from the time they left the station, but, as to this non-stopping through train, the danger zone began, not at the doors of the station, but, practically, with the south track; *and*, the Court of Appeals, in ruling that the five persons were passengers from the moment they left the station for the purpose of boarding what they supposed was the local train and that it was the duty of the engineer from that moment to do everything he reasonably could have done to stop or slacken the speed so as to prevent the accident, contravened *Boyd v. Railway Company*, 105 Mo. 371, and later cases, and its opinion is therefore quashed. The deceased was guilty of contributory negligence, and there was nothing in the facts which brings it within the range of the humanitarian rule.

Held, by WALKER, J., dissenting, that the facts of the case of *Boyd v. Railway Company*, 105 Mo. 371, are different from those in the instant case, and that the ruling of the Court of Appeals does not contravene the decision in that case, and hence the writ of *certiorari* herein should be quashed.

Certiorari.

WRIT QUASHED.

W. F. Evans, E. T. Miller, and A. P. Stewart for relator.

(1) The ruling of the Court of Appeals that, although deceased, who was *sui juris*, knew the train was approaching, yet, since the engineer testified that when his train was a quarter of a mile distant he saw a group of persons leaving the depot and knew they intended to cross the track, they were from that moment in the danger zone, and it was his duty at that time to stop or slow up his train so as to prevent the accident, and that as there was evidence tending to show that he failed in this duty, the humanitarian doctrine applied, contravenes the ruling of this Court in the following cases: *Kinlen v. Ry.*, 216 Mo. 145, 164; *Pope v. Railroad*, 242 Mo. 232, 239; *Reeves v. Railroad*, 251 Mo. 169, 177; *Keele v. Ry.*, 258 Mo. 67, 78; *Guthrie v. Rail-*

State ex rel. Frisco Railroad v. Reynolds.

road, 204 S. W. 185; Moore v. Ry., 176 Mo. 528, 544; Eppstein v. Ry., 197 Mo. 720, 733, par. (a); Boyd v. Ry., 105 Mo. 371, 379; Moody v. Railroad, 68 Mo. 470, 473; Laun v. Railroad, 216 Mo. 563, 580; Holland v. Ry., 210 Mo. 338, 351. (2) The ruling of the Court of Appeals that, since the engineer admitted that he knew the group of persons were going to cross the track from the time they left the depot building, and when the train was a quarter of a mile distant, he was not entitled to presume that persons who were *sui juris*, as was deceased, and who knew that the train was approaching, would not step from a place of safety into one of peril, or that deceased would stop and permit the train to pass, but that he was required at that time to make every effort to stop or slacken the speed of the train so as to prevent the collision, contravenes the rulings of this court in the following cases: Keele v. Ry., 258 Mo. 62, 79; Markowitz v. Ry., 186 Mo. 350, 358; Moore v. Ry., 176 Mo. 528, 546; Guyer v. Ry., 174 Mo. 344, 350; Van Bach v. Ry., 171 Mo. 338, 347; Boyd v. Ry., 105 Mo. 371, 380; Tanner v. Ry., 161 Mo. 497, 512; Reardon v. Ry., 114 Mo. 384, 405; Pope v. Railroad, 242 Mo. 232, 240. (3) The petition and plaintiff's main instruction being directly referred to in the opinion of the Court of Appeals, they become a part of the opinion for purposes of this review, and may be examined by this court. State ex rel. v. Ellison, 220 S. W. 498; State ex rel. v. Ellison, 176 S. W. 11. (4) The ruling of the Court of Appeals approving the main instruction given at the instance of plaintiff, which submitted the case on the theory of the humanitarian doctrine, but omitted to require a finding that deceased was oblivious to the impending danger as a predicate to a verdict for plaintiff, and holding it not to be reversible error to omit the element of obliviousness from said instruction, is contrary to the rulings of this court in the following cases: Kinlen v. Railroad, 216 Mo. 145, 164; Pope v. Railroad, 242 Mo. 232, 239.

Perry Post Taylor, Emil Mayer and Ben L. Shifrin
for respondents.

(1) We contend that to hold that the plaintiff made no case under the humanitarian rule would contravene controlling decisions of this court in the following cases: *Maginnis v. Ry.*, 268 Mo. 667, 671, 678; *Ellis v. Ry.*, 234 Mo. 657, 673, 680; *Holmes v. Ry.*, 207 Mo. 149, 163; *Holden v. Ry.*, 177 Mo. 456, 468; *Tavis v. Bush*, 217 S. W. 274. (2) There was good reason for the Court of Appeals to affirm the judgment of the circuit court; hence, such action should be upheld here. *State ex rel. v. Reynolds*, 270 Mo. 589, 601.

GRAVES, J.—*Certiorari* to the St. Louis Court of Appeals. Our writ was invoked in a case decided by that court, entitled *Charles N. Martin v. St. Louis San Francisco Railway Company*, wherein a judgment of \$5,000 obtained by plaintiff in the circuit court was affirmed by the Court of Appeals. The action was one by the husband for the alleged negligent killing of his wife. All charges of negligence were abandoned except the negligence covered by the humanitarian rule. In other words the case in the trial court was submitted solely on the humanitarian rule. Relator urges many conflicts between our opinions and the opinion of the Court of Appeals, the particulars of which will be noted in the course of the opinion.

The evidentiary facts are thus outlined in the opinion of the Court of Appeals.

“At about 10 a. m. on August 6, 1917, plaintiff’s wife was struck and killed by one of defendant’s east-bound through-passenger trains at Shrewsbury Station, St. Louis County. Hence arose this action for damages under the Compensatory Death Act (Sec. 5425, R. S. 1909). All allegations of primary negligence were abandoned by plaintiff, and the case was put to the jury under the humanitarian doctrine, resulting in a verdict and judgment for plaintiff for \$5,000. Defendant appeals.

“Defendant’s double track runs east and west at the point, and for about one-half mile west of the station the track is straight and then curves to the south. West-bound trains use the north track and east-bound trains the south track. North of both tracks is the station house, and south of the tracks is a platform where passengers board east-bound trains.

“On the morning in question, a local suburban accommodation train was due to stop at Shewsbury Station at 9:46 a. m. This train was late. About ten o’clock a through-passenger train, not scheduled to stop at this station and running several hours late and at the rate of forty-five miles per hour, rounded the curve one-half mile to the west of the station and proceeded eastward on the south or east-bound track on a down grade of about sixty feet to the mile. At this time the deceased, Mrs. Martin, two other ladies, and two children were in the station on the north side awaiting the local train. Hearing a train whistle to the west, they proceeded out of the station and across the track for the purpose of getting upon the platform on the south side so as to take what they supposed was the local accommodation train that was approaching and which would stop at the station.

“The inference is plain from the evidence that this group of passengers, including the deceased, knew the train was coming down the grade, but supposed that it was the local train and it would slow up and stop at the station. In that event there was ample time to cross the track in safety. As it turned out, the train was a through train running very fast and not scheduled to stop. The result was that the two ladies and the children barely crossed the track in time, and Mrs. Martin, who was just behind the others, was struck and killed just as she stepped off the south rail of the east-bound track. One second more, or two at the most, and she would have reached a place of safety.

"The testimony of the engineer, who was called by the plaintiff, shows that this train of nine coaches was running on about the time of the local train which was passed by his train at Valley Park, twelve miles to the west; that as he approached the station traveling forty-five miles per hour and when about one-quarter of a mile (1320 feet) west of the station, he saw this group of passengers leave the depot and start across the tracks, and that he knew they were going to cross in front of his train. While the engineer says that he did not see the deceased until just before his engine struck her, he did see the group of passengers crossing the tracks, and other evidence is to the effect that Mrs. Martin was among the group. Realizing at that moment that these women and children were going to cross in front of his engine, the engineer testified he gave his brakes what is termed a 'service application,' which is the ordinary method of stopping the train as distinguished from an 'emergency application,' which slows up and stops the train quicker than the 'service application,' and which is used in cases of emergency. He says he took this action in order 'to give the group of passengers time to get across.'

"While the engineer testifies he applied the brakes as stated and lessened the speed of the train from a point one-quarter of a mile from the station, there was evidence tending to show that the speed of the train was not slackened until after the deceased was struck. There was further evidence tending to show that had the engineer given the brakes an emergency application instead of a service application, the train could have stopped within the 1320 feet under the condition that existed. In any event, by such emergency application the speed of the train could have been so slackened that the deceased would have had time to have escaped from the on-coming locomotive. While the engineer says that having once given the brakes the service application he could not thereafter, for mechanical reasons, apply the

emergency brakes, this is disputed by another experienced engineer who testified for plaintiff."

Counsel for relator, after setting out the foregoing portion of the Court of Appeals' opinion and directing our attention thereto, then thus proceed to outline their conclusions of the rulings of the court:

"On this statement of facts, the Court of Appeals held:

"(1) That when the engineer saw the group of people leaving the station for the purpose of going to the south side of the track to take what they supposed was the local accomodation train which he knew was following his train, and when he knew that they were going to cross the track, they were from that moment in the danger zone, and the duty then devolved upon the engineer to do everything he could reasonably do to either stop or slow up the train so as to prevent the accident, and that, as there was evidence tending to show that he failed in this duty, the case was properly submitted to the jury under the last-chance rule; and,

"(2) That, since the engineer admitted that he knew the group of people were going to cross the track from the time they left the depot building, he was not entitled to presume that persons who were *sui juris* would not step from a place of safety into one of peril.

"The Court of Appeals further approved the main instruction given by the trial court at the instance of plaintiff, which instruction submitted the case to the jury on the theory of the humanitarian doctrine, but omitted to require the jury to find, as a predicate to returning a verdict for plaintiff, that deceased was oblivious to the impending danger. The petition contained no allegation that deceased was oblivious to the impending danger. The Court of Appeals held that it was unnecessary that the petition should contain an allegation that deceased was oblivious to the impending danger, or that the element of obliviousness should be incorporated in the instruction, because of the evidence

of the engineer, who admitted that he knew the group of persons, of which deceased was one, were going to cross the track in front of his engine."

These holdings, they say, conflict with divers opinions of this court. This sufficiently outlines the case.

I. Relator is correct in urging that the Court of Appeals ruled that the deceased was in the danger zone from the time she left the depot on the north side of the two tracks, and started to the south. On this question, the court said:

"When the engineer saw this group of passengers leaving the station for the purpose of going to the south side of the track to take what they supposed was the local accommodation train, which he knew was following his train; and when he knew, as he admits, that they were going to cross the tracks, they were from that moment in the danger zone, the duty then devolved upon him to do everything that he could reasonably do to either stop or slow up his train so as to prevent the accident. As there was evidence tending to show that he failed in this duty, we think the case was properly submitted to the jury under the last-chance rule."

It should be noted that the court further says that "there was evidence tending to show that the speed of the train was not slackened until after the deceased was struck." From whence this evidence comes

**Evidentiary
Facts.**

the court does not enlighten us in the opinion. Under our rule we take the evidentiary facts in the opinion for the facts in the case, and we shall follow that rule in this case. Curiosity, however, prompted us to read the record in the Court of Appeals, and it there appears that the woman just ahead of the deceased looked up at the approaching train twice, and saw that it was coming very fast and was not slackening its speed. She was the leading witness for plaintiff. By other persons who were on the south side of the track awaiting this local train, it was shown that the speed of the train was not slackened, and that by the time the train

covered half of the clear distance between the curve and the depot, they discovered that it was not the local by the very facts that it was running so fast and was not slackening its speed. What other waiting passengers saw, deceased might have seen. Of course these details, helpful as they might be, we cannot, and will not consider. We shall take the evidentiary facts just as they are in the opinion, although it might weaken the ruling of our learned brothers, if the actual facts, stated above, appeared. They did rule that the danger zone for the deceased began at the depot, and extended clear across the tracks. In other words they ruled that it was the duty of this engineer to begin the process of protecting deceased, as if in a perilous position, and oblivious thereof, from the time she emerged from the depot. Deceased was *sui juris* and possessed of all her faculties. Is this ruling in conflict with our rulings? Of that question next.

II. The Court of Appeals says: "The inference is plain from the evidence that the group of passengers, including the deceased, knew the train was coming down grade." From the real record the word "inference" would apply to deceased rather than the others. This because her mouth was closed at the trial. The others testified, and we have indicated *supra* the character of their testimony. One went so far as to say that she discovered it was not the local train (by its speed) before she crossed. And she was just ahead of deceased. These facts we eliminate, however, and take the court's statement that "the inference is plain" that they knew of the approaching train. We also take the court's statement that the engineer knew that the purpose of these three ladies and two children was to cross those tracks. With both statements taken for the facts, we yet have those parties knowingly leaving a place of safety, and putting themselves in a place of peril. Concede that they thought it to be the local train, yet they were cross-

Danger Zone:
Passenger:
Humanitarian
Rule.

ing railway tracks, one of which would be occupied by the engine of that train. They were crossing from the depot directly across to a platform opposite, as we gather the facts from the opinion. The engine of even the local train would have to cross their pathway, before its train would be in position to receive passengers. The deceased was, under all the facts, head-bound for a place on the railway tracks, which she knew would sooner or later be occupied by the moving engine of the train, whether it be the local train or some other train. Her duty was to see just where the moving engine was, and the rate of its speed, before she attempted to cross the track. This because, as the Court of Appeals finds, she knew the train was coming. She with knowledge of the fact of the approaching train was not *oblivious* of her danger. Now as to the situation of the engineer on the train. He saw these parties, and the track being clear and straight, he had the right to assume that they saw his train and the speed of the train. Their actions indicated to him that their purpose was to cross the track, but their actions also indicated that they knew (as the Court of Appeals finds) of the approaching train, and its speed. He knew that the local was behind him, and he had the right to assume that they, if waiting passengers, knew the local train had not arrived on time. In other words, that such train was off of schedule time. But the mere fact that these parties were going to cross the tracks would not necessarily indicate that they were intending passengers. The engineer had the right to assume (knowing from their acts that they saw his train, and hence the speed thereof) that these parties would look and stop before entering upon the track, the real danger zone. The mere fact that he might have believed, or even knew, that their purpose was to cross the tracks, and that too, before the arrival of his train, did not deprive the engineer of the right to assume that they would stop their progress before real danger was reached. This, because to him their actions disclosed their knowledge of his approaching train, which knowledge carried with it knowledge of the

fact that the engine was approaching very fast. The Court of Appeals says that the engineer would have no right to assume that these parties, with knowledge of an approaching train, the engine of which must cross their pathway, whether such train be the local or some other train, would cease their progress across the tracks, before placing themselves in actual danger by going upon a railroad track immediately in front of a rapidly moving engine. Once you concede that the parties had knowledge of the approaching train, and that there were acts to indicate to the engineer that they had such knowledge, then there is no danger zone until the track is practically reached. This for the reason that the engineer can assume that approaching parties (knowing that the train was coming) would stop before going on the track, rather than hurl themselves upon the track directly in front of the rapidly moving train. This assumption, the Court of Appeals ruled, was not proper, and that the danger zone began at the depot. In this they contravene our cases.

The ruling clearly conflicts with *Boyd v. Railway Co.*, 105 Mo. 371, and the many cases which have followed that case. The facts of the *Boyd Case* are in many ways similar to the case at bar. The Court of Appeals make an attempt to distinguish it from their case, but it cannot be successfully done. Judge BRACE has succinctly stated the facts of *Boyd's Case*, at page 378, thus:

"The evidence for the plaintiff disclosed the following facts: Charles Boyd, the husband of plaintiff, was a hotel keeper in the town of Renick in Randolph County. His hotel was situated about one hundred feet north of the depot. The defendant's tracks are between the hotel and the depot. A plank walk leads from the hotel across the tracks to the platform of the depot, and was used as a public crossing. In the prosecution of his business, he was in the habit of going to the depot upon the incoming of all passenger trains stopping at that station. One of defendant's regular passenger trains, the mail from Kansas City to St. Louis, was due from the west at

Renick daily at 12:30 p. m., and usually passed over the crossing from the hotel at a speed of three or four miles an hour, stopping at the platform just east of the crossing.

"On the twenty-sixth of September, 1887, an excursion train approached Renick from the west on the time of the Kansas City and St. Louis mail, and running as its first section; it signaled its approach by whistling at the usual place. The train from the time it whistled until it passed the depot, at which it did not stop, was running at about forty or forty-five miles an hour; as the train approached the depot its bell was rung, and kept ringing, but its speed was not checked. When Mr. Boyd heard the train whistling he was in the house; he immediately came out and started for the depot on the plank walk in a run or 'trot' and without breaking his gait entered upon the track immediately in front of the engine and was struck just as he was about to make his last step over the track, and instantly killed. Mr. Boyd was a small, active man, quick in his movements, about fifty-two years of age, and in the enjoyment of all his senses. The train was in plain view, and its sound in his hearing from the moment he started from his hotel, on the plank walk, until he entered upon the track. That he both heard the train and saw it, in a general way, there is no question; but he did not stop a moment in his course to observe its movement, to ascertain whether it was the regular train he was expecting, and which would stop at the depot, and whose speed as it slowed up for that purpose he could accurately gauge from his long and frequent experience, or, as it proved to be, a special going at a high rate of speed and showing no evidence of an intention to stop; dominated perhaps by the first impression received in the house when he heard the whistle, that this was the regular mail, he hastened towards the depot and onto the track without stopping for a moment to test by sense of sight or sound the correctness of his first impression, and as the result of his heedlessness lost his life. This is one view of the case presented by

State ex rel. Frisco Railroad v. Reynolds.

plaintiff's evidence, as through it we look back at the unfortunate accident after it happened; another may be taken of it, that observant of his surroundings he may have miscalculated his own speed and that of the train, and hazarded the chance of getting across the track in safety before the engine could strike him. In either view his death was the result of his own negligence.

"The evidence for plaintiff further showed that the deceased in going from his hotel to the track was in plain view of the defendant's servants on the locomotive, and there was evidence tending to prove (upon the hypothesis that the train was going at the rate of forty miles an hour) that, if the engineer had commenced checking his train at three hundred feet from the point of collision, the speed of the train could have been so diminished that it would have reached that point two seconds later than it did, and deceased would have escaped without injury."

There is every material fact in that case, that there is in the case under consideration. It is true that Boyd was not an intending passenger, but his purpose to get to the depot where his expected train would stop is the same. In Boyd's case, the deceased was running to get over the track to the depot; the engineer saw him or could have seen him in time to have so checked his train as to have avoided injury; Boyd was in view from the time he left this hotel, and his acts showed that he intended to reach the depot across the tracks, just as the acts of these parties showed that they intended to reach the platform across the tracks; Boyd knew there was a train coming, but thought it to be a train which was then due to stop there, as did these parties think; Boyd was killed by an extra train running forty to forty-five miles per hour, which was not to stop, as was deceased killed in the case before the Court of Appeals. The facts are so near indetical, and so very similar, that the same principles of law must be applied to each.

The Boyd Case ruled that the danger zone was the railroad track, and further ruled that, although the engineer saw Boyd running toward the depot, the engineer

had the right to assume that he would check his progress before going upon the railroad track. We also then ruled that the plaintiff's evidence did not make a case for the jury upon the humanitarian rule, or any other rule, and reversed the judgment for plaintiff, which was rendered under her instruction covering the humanitarian rule. The doctrine of Boyd's case has been consistently followed by this court (as the Missouri Citator will show), but we shall not stop to compare the other cases with the facts of the present case. The curious may examine *Kinlen v. Railroad*, 216 Mo. l. c. 158; *Holland v. Railroad*, 210 Mo. l. c. 351; *Sites v. Knott*, 197 Mo. l. c. 712-713; *Mockowik v. Railroad*, 196 Mo. l. c. 570; *Boring v. Street Railway Co.*, 194 Mo. l. c. 549. [See, also, *Laun v. Railroad*, 215 Mo. 563; *Pope v. Railroad*, 242 Mo. l. c. 239-40; *Reeves v. Railroad*, 251 Mo. l. c. 177-8; *Keele v. Railroad*, 258 Mo. l. c. 78-79; *Guthrie v. Railroad*, 204 S. W. 185.] Boyd's Case is so similar in facts, that without departing from the rules announced in it we cannot sustain the judgment and opinion of our learned brothers of the Court of Appeals.

III. There are two or three other alleged conflicts between the opinion of our learned brothers and our opinion, but we are so thoroughly satisfied that their opinion conflicts with Boyd's Case, and all of the cases following it, that we shall not go further. A discussion of these alleged conflicts would serve no good purpose in view of what we have just ruled. We might add, and properly so, that under our ruling in Boyd's Case, the opinion of the Court of Appeals is wrong and conflicting in holding that, under the facts shown, the plaintiff was entitled to have his case go to the jury. We reversed Boyd's Case because wrongfully submitted to the jury on facts fully as strong for the plaintiff there as are the facts for the plaintiff here. So the opinion conflicts wherein it says that defendant's demurrer to the evidence was properly overruled by the trial court. Under these views review of other alleged

Other
Conflicts.

conflicts can serve no purpose, because the Court of Appeals, following our views in this opinion, will have to reverse absolutely the judgment *nisi*.

The judgment and opinion of the St. Louis Court of Appeals, for the reason stated, is quashed.

All concur, except *Walker J.*, who dissents in opinion filed; *J. T. Blair, C. J.*, concurs in result.

WALKER, J. (dissenting).—The facts in the Boyd Case, as I read them, are different from those in Martin v. Railroad. In my opinion, the ruling of the Court of Appeals in that case does not contravene the opinion in the Boyd Case, and hence our writ should be quashed; which conclusion results in my dissenting from the majority opinion.

ELIZABETH EVANS v. ILLINOIS-CENTRAL RAILROAD COMPANY, Appellant.

In Banc, July 22, 1921.

1. **TOFT: Railroad Train: Unlawful Speed: Wilful, Wanton and Reckless Injury.** The mere act of trainmen in moving a railroad train at a speed of forty or forty-five miles an hour across a much used public street in a densely settled portion of a city where people are likely to use said crossing at any time, without ringing the bell or blowing the whistle, is not sufficient to authorize a submission to the jury of the question whether such act was wilful, wanton, reckless and in conscious disregard of the life and bodily safety of a traveler on such street, there being no showing that the engineer or fireman intentionally ran the train upon such traveler, or saw him approaching the track or in a position of danger or likely to be in such position, or within what distance the train could have been stopped if the traveler had been so seen.
2. ———: ———: ———: **Contributory Negligence.** The acts of the driver of an automobile, in attempting to cross a railroad track in broad daylight at a public crossing where he had reason to expect a train at any moment and where for a distance of fifteen

feet from the track he had an unobstructed view of any train that might be approaching, without looking, and where, if he had looked, he could have seen the train which struck him for a distance of three to six hundred feet, constituted such contributory negligence as would bar a recovery by his widow in an action based on an allegation of negligence. And although the acts of the trainmen in approaching the public crossing at an excessive speed and without blowing the whistle or ringing the bell constituted negligence on the part of the railroad company, such negligence on the part of the traveler would constitute a complete defense to an action based on an allegation of negligence.

3. ———: ———: ———: **Wilful, Reckless and Wanton Injury: Definition.** Wilfulness implies intentional wrongdoing. A wanton act is a wrongful act done on purpose or in malicious disregard of the rights of others. Recklessness is an indifference to the rights of others and an indifference to whether wrong or injury is done to another. The words "conscious disregard of the life and bodily safety" of another add nothing to the words "wilful, wanton and reckless."
4. ———: ———: **Contributory Negligence as Defense: Intentional Injury.** Negligence of the injured party is no defense when such injury is intentionally inflicted. But the intention of the engineer to injure a traveler at a public street crossing in a densely crowded city cannot be inferred from the mere fact that the train was run at an excessive speed without ringing the bell or sounding the whistle. Such acts constitute negligence, but they do not alone justify the inference that they were wilfully, wantonly and recklessly done.
5. ———: **Contributory Negligence: Recovery for Wanton or Reckless Injury.** Where the acts of defendant constitute mere negligence, and the acts of the injured party constitute contributory negligence and a complete defense to an action for negligence, the case cannot be submitted to the jury on the theory that defendant's negligent acts constituted a wanton, wilful and reckless injury. Before a case can be submitted to the jury on the theory that defendant's acts were wanton, wilful and reckless, and therefore that the injury was intentionally inflicted, something more than acts which heretofore have been held to constitute mere negligence must be shown. But such rule does not prevent a showing in any case of acts which of themselves indicate an intentional or wanton injury, or affect the other rule that contributory negligence constitutes no defense to an action for injuries intentionally inflicted.

Appeal from St. Louis City Circuit Court.—*Hon. Thomas C. Hennings*, Judge.

REVERSED.

Watts, Gentry & Lee for appellant; *John G. Drennan* of counsel.

(1) Defendant's demurrer to the evidence should have been sustained. A plaintiff must prove the cause of action on which he sues. He may not allege one cause of action, wholly fail to prove it, recover upon an entirely different one, and uphold his judgment. *Henry Co. v. Citizens Bank*, 208 Mo. 209; *Canaday v. U. Rys. Co.*, 134 Mo. App. 282; *Marr v. Zeidler*, 145 Mo. App. 199. (a) Plaintiff did not base her claim on negligence. She alleged "willful, wanton, reckless and conscious disregard of the life and bodily safety of deceased." She offered no evidence tending to prove such allegations, and proved nothing but a high rate of speed and failure to ring the bell. (b) Both of such acts constitute mere negligence. *Lambs v. Mo. Pac. Ry. Co.*, 147 Mo. 171, 181; *Weller v. Railroad*, 120 Mo. 635, 653; *Laun v. Railroad*, 216 Mo. 563, 579; *McGee v. Railroad*, 214 Mo. 530; *Holland v. Railroad*, 210 Mo. 338; *Eugenia Stotler v. Ry. Co.*, 200 Mo. 107; *Geo. Stotler v. Railroad*, 204 Mo. 619; *Schmidt v. Railroad*, 191 Mo. 215; *Prewett v. Eddy*, 115 Mo. 283; *Payne v. Railroad*, 136 Mo. 562; *Tanner v. Mo. Pac. Ry. Co.*, 161 Mo. 497. (c) If an act is negligent it cannot be willful or wanton. *Raming v. Met. St. Ry. Co.*, 157 Mo. 508; *Christy v. Butcher*, 153 Mo. App. 397; *O'Brien v. Transit Co.*, 212 Mo. 59. (2) Instructions numbered 1 and 2, respectively, were erroneous in that they permitted the jury to find that the rate of speed and the failure to give warning constituted "willful, wanton, reckless and conscious disregard of the life and bodily safety of the deceased," when there was no evidence on which to base such finding.

Glendy B. Arnold for respondent.

(1) The judgment of the lower court ought to be affirmed. *Lake Shore Ry. Co. v. Bodemer*, 139 Ill. 596;

East St. Louis Ry. Co. v. O'Hara, 150 Ill. 580, 585. (2) When the basic facts are admitted to be true, and different intelligent minds may, according to the common experience of mankind, draw different conclusions from them, the case is one for the jury. Baird v. Ry. Co., 146 Mo. 265. The facts are few and simple. (3) Every engineer operating trains over this crossing knows that there are many circumstances under which the driver of a team or an auto truck or a passenger automobile, might drive onto this crossing, in front of a moving train, unconscious of its approach, if no warning is given, without being guilty of contributory negligence. Of course he knows that careless drivers and sometimes even the most careful drivers have momentary mental lapses, are likely to drive onto the tracks oblivious of the approach of a rapidly moving train. When this happens it means almost certain death if the engineer has lost control of his train or fails to give warning signals of its approach. These facts merely accentuate the inherent danger of this crossing. It is used by large numbers of people and some use it cautiously and others carelessly, but whether the one or the other the engineer must look out for all of them. Illinois Central Ry. Co. v. Hutchinson, 47 Ill. 408. The rights of the railroad and the traveling public over this crossing were mutual and reciprocal. Stillson v. Railroad, 67 Mo. 671. Neither had a superior right to the other and neither could require the other to make way for him, and each was required to so use the crossing as to avoid collision. Baker v. Railroad, 140 Mo. 140; Frick v. Railway, 75 Mo. 595. The humanitarian principle imposed a greater amount of caution upon the engineer than upon the ordinary traveler, because a railroad train is the most dangerous vehicle that uses our public highways. Frick v. Railway, 75 Mo. 595. (4) It is now and long has been the settled law in this State that when the motorman of a street car and the engineer of a train, running a car or train over the public streets of a densely populated

city, by reason of darkness or other cause, are unable to discover the presence of vehicles or pedestrians on the tracks at places where it is their duty to anticipate their presence, ordinary care requires them to approach such places with the car or train well under control and to give timely and frequent warnings of its approach. *Zander v. Transit Co.*, 206 Mo. 445; *Grout v. Electric Ry. Co.*, 125 Mo. App. 552. This rule has also applied to drivers of automobiles along public streets. *Solomon v. Duncan*, 194 Mo. App. 517. They are chargeable by law with knowledge of the presence of persons on or approaching the tracks, at such places, whether or not they actually see or know of their presence there. *Frick v. Railway*, 75 Mo. 595. In law, constructive knowledge is equivalent to actual knowledge. (5) When approaching a public crossing, in a densely populated section of the city, the necessity for vigilance and caution naturally increases commensurately with the increase in the danger to others lawfully using the crossing. *Holmes v. Railway*, 207 Mo. 149, 163. Under these rules it was the duty of this engineer to approach this crossing with his train under such control as would enable him to avoid a collision at the crossing by stopping his train, if necessary, or by slackening its speed, or by giving a timely signal of the train's approach. *Holden v. Railroad*, 177 Mo. 475. (6) The omission of all care for the safety of others at times and places when and where the probability of injury or the loss of human life is remote, is mere negligence, but when the loss of life is the natural or probable result of the omission of due care, it is wantonness and willfulness. *I. C. Ry. Co. v. Leiner*, 202 Ill. 624. (7) A conscious disregard of human life cannot be inferred from high speed and failure to warn, yet those facts were held by this court amply sufficient to sustain a conviction of manslaughter. *State v. Watson*, 216 Mo. 420, 435. (8) It may be argued that there is a difference between culpable negligence in the criminal law and wantonness in the law of torts. There

is, but the distinction in name only. The facts that establish the one prove the other. Culpable negligence is more than negligence in the law of torts. *State v. Horner*, 266 Mo. 109; *State v. Emery*, 78 Mo. 77; *Elgin Ry. Co. v. Duffy*, 191 Ill. 489, 492.

DAVID E. BLAIR, J.—Appeal from the Circuit Court of the City of St. Louis. The verdict and judgment there were for respondent in the sum of \$10,000.

On April 19, 1916, respondent's husband, Harry Evans, was fatally injured and almost immediately died as the result of a collision between a Ford automobile moving westward and driven by him and a train of appellant, consisting of a locomotive and passenger cars moving northward at the crossing of the terminal railroad tracks over Brooklyn Street in the City of St. Louis. Said Brooklyn Street at this point is a much used public street. The accident occurred in the forenoon. Foster Robbins was riding in the automobile with said Evans as it approached the railroad tracks. The uncontradicted evidence shows that the train was moving at a rate of forty or forty-five miles per hour and that no bell was rung or whistle blown to give warning of its approach. A train could be seen for a distance of several hundred feet south of Brooklyn Street from a point fifteen feet east of the railroad tracks. As soon as Robbins saw the train, which was at that instant almost upon the crossing, he jumped out of the automobile and escaped injury. The automobile was carried on the pilot of the engine about five hundred feet north of the crossing, at which point the train was brought to a standstill. Evans was thrown off a little over three hundred feet north of the crossing.

St. Louis Terminal Railway Company and St. Louis Merchants Bridge Terminal Railway Company were joined as parties defendant. Said defendants filed demurrers to the evidence at the close of plaintiff's case, which were given by the court. Defendant Illinois Central Railroad Company also offered a demurrer to the

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evidence at the close of plaintiff's case. This was refused and said defendant stood on its demurrer.

The amended petition on which the case was tried was in the form usually drawn in such cases, except that it did not charge that the acts of defendant were negligent. Said petition contained the following allegation:

"Plaintiff further states that the death of her husband, Harry Evans, as aforesaid, was caused by defendants' wilful, wanton, reckless and conscious disregard of the life and bodily safety of the deceased in this, to-wit, that with knowledge that the crossing of said tracks with said Brooklyn Street was much used for travel and was dangerous to travelers using the same, the defendants ran said train to and over said Brooklyn Street and onto and against the deceased at a speed of from forty to forty-five miles per hour, without giving the deceased any warning of the approach of said train."

Appellant filed an answer containing a general denial and an allegation as follows:

"Further answering, this defendant says that the death of Harry Evans, referred to in plaintiff's second amended petition, was caused by his own negligence directly contributing thereto, in this, to-wit: .

"That on the occasion referred to in plaintiff's second amended petition the said Evans negligently and carelessly drove an automobile upon the railroad track directly in front of the train operated by the defendant Illinois Central Railroad Company, and so near to said train that it was impossible, by the exercise of ordinary care on the part of said defendant, to stop said train after the appearance of said Evans upon and near said track, and, in so driving upon said track, the said Evans negligently and carelessly failed to look and listen for the approach of trains, and negligently and carelessly failed to avoid being struck by trains."

The portion of said answer above quoted was stricken out on plaintiff's motion on the ground that the same constituted no defense to the cause of action set forth in plaintiff's petition.

At the request of respondent the court gave Instruction 1, detailing the facts necessary for the jury to find to authorize a verdict for respondent. It is unnecessary to quote it in full. It concludes as follows:

“That under all the facts and circumstances, as shown by the evidence, the running of said train over said Brooklyn Street at said speed, if you so find, was a wilful, wanton, reckless, and conscious disregard by the servants of said defendant in charge of said train of the life and bodily safety of the deceased, and directly caused or directly contributed to the cause of the death of the deceased, then your verdict will be for the plaintiff, and against said defendant Illinois Central Railroad Company.”

Instruction 2 given at the request of the respondent is as follows:

“The court instructs the jury that the plaintiff is not entitled to recover in this case on the ground of mere negligence on the part of the defendant’s servants in charge of said train, but before you can find for the plaintiff you must believe and find from all the evidence that the conduct of the defendant’s servants in the running and operation of said railroad train at the time and place mentioned in the evidence was characterized by a wilful, wanton, reckless, and conscious disregard of the life and bodily safety of the deceased, and unless you so find, your verdict must be for the defendant.”

Thus it is clear that the theory on which the case was tried below was that the mere act of the servants of defendant, in moving its train at a speed of from forty to forty-five miles per hour over tracks laid in a public street and across another much used public street and in a densely settled portion of the city where people are likely to use said crossing at any time, without ringing the bell or blowing the whistle, is sufficient to authorize submission to the jury of the question whether such act was wilful, wanton, reckless and in conscious disregard of the life and bodily safety of respondent’s husband, without showing that the engineer or fireman inten-

tionally ran said train upon respondent's husband, or saw him approaching the track or in a position of danger or likely to be in such position of danger, or within what distance such train could have been stopped if deceased had been seen in a position of peril and oblivious to such peril. No evidence was offered tending to show that the engineer or fireman saw deceased or intentionally ran said train upon him or what they were doing as the locomotive approached the scene of the accident or what could have been done by them to prevent collision.

The acts of respondent's husband, as shown by the evidence before us, in attempting to cross the railroad tracks in broad daylight at a point where he had reason to expect trains at any moment and where he had an unobstructed view of any trains that might be approaching the crossing, without looking for a train or where, if had looked, he could have seen the train approaching for a distance of three to six hundred feet, constituted negligence on his part that would bar a recovery by his widow in an action based on an allegation of negligence. [Hayden v. Railroad, 124 Mo. 566; Kelsay v. Railroad, 129 Mo. 362; Huggart v. Railroad, 134 Mo. 673; Stotler v. Railroad, 204 Mo. 619.]

It appears from the evidence that a great many trains moved over these tracks. One witness estimated the number at one hundred daily. At and from a point about fifteen feet from the track deceased could have seen the train coming if he had looked. There was no obstruction to the view. No reason why the approaching train could not have been seen is given. Robbins testified that deceased was looking directly ahead when he first looked to the north. This was at a point where the train could be seen. When he looked to the south and instantly saw the approaching train deceased was then looking south also. The top of the automobile was up, but the side curtains were not on and there was nothing in the car itself to obstruct the deceased's view. The automobile was moving up grade in low gear at a speed of five to six miles per hour. Deceased could have

stopped it almost immediately. It was his duty to approach the crossing at such speed that he could stop after reaching a point where he could see the approaching train and before coming within the danger zone.

This court has never passed on the question involved here. Respondent cites cases from other jurisdictions tending to support her contention that wanton and wilful conduct can be inferred from such facts as are here proven and under such circumstances as existed here without showing the actual conduct of the engineer and fireman further than the speed of the train and failure to give warning. We have repeatedly held that the acts of servants of a railroad company in approaching a public highway crossing at excessive speed and without blowing the whistle or ringing the bell, even when such crossing was in a congested district in a city, constitute negligence, and that negligence of the injured party contributing to the injury is a defense. This has been held in many cases, such as *Stotler v. Railroad*, 204 Mo. 619; *Hafner v. Transit Co.*, 197 Mo. 196; *Green v. Railroad*, 192 Mo. 131. The act cannot be both negligent and intentional at the same time. Such allegations are inconsistent. [*Raming v. St. Ry. Co.*, 157 Mo. 477, l. c. 508; *O'Brien v. Transit Co.*, 212 Mo. 59.]

In *Hinzeman v. Railroad*, 182 Mo. l. c. 623, in discussing the words "wilful, wanton and reckless," *VALLIANT, J.*, said:

"Among the instructions given for the defendant was the following:

"'4. Unless the jury believe from the greater weight of the evidence that the defendant's engineer in charge of the locomotive which struck the deceased, willfully, wantonly or recklessly ran deceased down and killed him, your verdict must be for the defendant.'

"The trial court assigned the giving of this instruction as its reason for sustaining the plaintiff's motion for a new trial. The learned trial judge was right in condemning that instruction.

"If the engineer saw the man in a position of danger, apparently inattentive to the approaching train, and if, with the means at hand, by the exercise of ordinary care, he could have given him timely warning, yet neglected to do so, then the case falls within the exception to the rule that a plaintiff can not recover if his own negligence has contributed to his injury. In discussing that exception to the general rule the courts have characterized the conduct of an engineer under such circumstances as reckless, wanton or willful; but those are words of characterization expressing a conclusion, a judgment; the fact upon which that conclusion is based is the neglect of the engineer under the given circumstances to exercise ordinary care with the means at hand to avert injury."

Wilfulness implies intentional wrongdoing. A wanton act is a wrongful act done on purpose or in malicious disregard of the rights of others. Recklessness is an indifference to the rights of others and an indifference to whether wrong or injury is done or not. As we understand the words "conscious disregard of the life and bodily safety" they add nothing to the words "wilful, wanton and reckless" and are included within the meaning of those words. As applied to an act they necessarily mean that such act was intentionally done without regard to the rights of others and in full realization of the probable results thereof.

Negligence of the injured person is no defense when such injury is intentionally inflicted. [Raming v. St. Ry. Co., 157 Mo. l. c. 507, citing and quoting approvingly from 1 Shear. & Redf. on Neg. (5 Ed.) sec. 64.]

All that is shown here is that the train was moving at a high rate of speed and without warning toward and over a busy public street. It is not shown that people were on the crossing in a position of peril as the train approached or that the engineer or fireman saw the deceased at all. There is ample evidence of negligence, but the engineer had the right to assume that even though he was negligent the deceased would not be injured there-

by, because deceased himself would not be expected to come on the track in front of the train without himself exercising proper care. The railroad track was in itself a warning of danger to the public and the engineer had the right to assume that persons approaching such track would use due care. In other words, although negligent, such engineer is not shown to have been acting in such conscious disregard of the rights of deceased as to amount to wilful or intentional wrongdoing.

This is not like a case where one drives an automobile at high speed through a densely crowded street when he knows that people are upon and crossing the street and exposed to danger and likely to be struck by his automobile moving at such high speed. Such an act under such circumstances could well be held to be criminal negligence. The law would read into his act an intention to injure. The same act in the dead hour of the night when the same street was presumably clear would be nothing more than negligence for which a civil action only would lie.

Respondent has failed to show that appellant wilfully, wantonly and recklessly caused the death of her husband. The only inference the jury was entitled to draw from the evidence was negligence on the part of appellant. An act cannot be held to be wilful, wanton and reckless by only showing a failure to exercise the degree of care due under the particular circumstances. Nothing more is shown here.

We have carefully considered the cases from other jurisdictions relied on by respondent. We are not prepared to follow those cases and to depart from the rule well established in this State that the character of acts here discussed merely constitute negligence. Before a case can be submitted to a jury on the theory that the act complained of was wilful, wanton and reckless, something more than acts heretofore regarded as constituting mere negligence must be shown. To rule that intentional injury may be inferred from such facts as are before us in this case would overwhelm our courts with a flood of

perjured testimony, as the procuring of a witness to swear that any train was moving at high speed without warning when the accident occurred at a railway crossing in a densely settled city would present no practical difficulty to unscrupulous litigants or counsel of like character. If wilful, wanton and reckless conduct may be inferred from the proof of such facts a further difficulty presents itself. What speed would justify the trial court in submitting such question to the jury? A speed that would appear to one trial judge to be wilful, wanton and reckless, signifying intentional wrongdoing, might appear to another judge as being evidence of nothing more than mere negligence. No two judges would agree when and under what circumstances failure to give warning would authorize the submission of such question. Such a rule would undoubtedly result in chaos in the law governing crossing cases and in such cases effectually destroy the salutary rule that one whose own negligence contributes to his injury cannot recover for the negligence of another also contributing to such injury. The rule we have here announced will not prevent the showing in any case of acts which themselves indicate an intentional or wanton infliction of injury or affect the rule that contributory negligence constitutes no defense to intentional infliction of injury.

Assuming that the petition here either is now sufficient or can be so amended as to support a recovery on the ground of negligence, should the case be remanded for a new trial? The evidence now before us shows contributory negligence on the part of deceased as a matter of law, which is a complete defense as against a charge of mere negligence. As we understand the case all the persons who saw the accident testified at the trial and it is not shown that other or further testimony on the question of deceased's conduct at the time of the accident is available. Neither does it appear that any acts of the servants of defendant, other than already appearing in the record, can be shown. A retrial would therefore be useless.

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For the reasons set forth, the judgment of the trial court is reversed. *Graves, Higbee, Elder and Walker, JJ.*, concur; *J. T. Blair, C. J.*, concurs in the result; *Woodson, J.*, dissents.

THE STATE ex rel. JOHN W. CALHOUN, Judge of Circuit Court; JOHN H. CONRADES et al., Receivers of BLUE BIRD MANUFACTURING COMPANY; WALTON & SPENCER COMPANY, and OSCAR MANDEL et al., Comprising Firm of MANDEL & SCHWARZMANN, v. GEORGE D. REYNOLDS et al., Judges of St. Louis Court of Appeals.

In Banc, July 22, 1921.

1. **CERTIORARI: To Court of Appeals: Extent of Review: Error.** Upon *certiorari* the Supreme Court will not determine whether the Court of Appeals erred in the application of the law to the facts stated in its opinion, but will only determine whether, upon the facts, it announced some conclusion of law contrary to the last previous ruling of the Supreme Court upon the same or a similar state of facts.
2. ———: ———: **Appointment of Receiver: Jurisdiction Based on Facts.** If the Court of Appeals, in prohibition, erred in holding that the petition filed in the circuit court did not show jurisdictional facts sufficient to warrant the appointment of a receiver for a corporation, it erred in a matter of opinion, and the facts being not the same or similar to those in other cases decided by the Supreme Court, its opinion cannot be quashed on *certiorari*.
3. ———: ———: ———: **Resignation of Officers: Prohibition: After Judgment Rendered.** Three individuals had been appointed receivers of a corporation, which owned fifty-one per cent of the capital stock of another corporation, whose directors and officers had resigned, and on the following day said three receivers applied for the appointment of a receiver for said other corporation, alleging in their petition their ownership of fifty-one per cent of its capital stock and the resignation of said directors and officers, and that because of their resignation its assets were in danger of being utterly wasted and dissipated, and that its assets were being subject to attachment suits. The Court of Appeals, in a prohibi-

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tion proceeding, held that the resignation of the officers and directors did not create such a condition of extreme necessity as called for the appointment of a receiver on the next day after their resignation, and that the petition did not demonstrate that the petitioners had no other adequate remedy, and that therefore the circuit court, under the circumstances and in view of the allegations, had no jurisdiction to appoint the receiver. *Held*, on *certiorari*, that the facts, as stated in the opinion of the Court of Appeals, are in no way analogous to the facts of the cases of *State ex rel. v. Shields*, 237 Mo. 329, and *State ex rel. v. Mills*, 231 Mo. 493, and its opinion did not contravene the ruling in those cases. *Held*, further, that, although the Court of Appeals, by its judgment, may have interfered with the action of the circuit court, after that court had determined and assumed jurisdiction upon the facts before it, nevertheless, it cannot be said, because of the dissimilarity of the facts in this and other cases, that there is a contrariety of opinion.

- 4 ———: ———: ———: **Resignation of Corporate Officers: The Price Case.** It was not ruled in the case of *Price v. Trust Co.*, 178 S. W. 745, that a court of equity has jurisdiction to appoint a receiver for a corporation which has no officers or directors where its property is threatened with waste or sale or dissipation, but what was there said at page 749 was either *obiter* or made *arguendo*; but even if it had been there so ruled, the opinion of the Court of Appeals in the instant case would not conflict therewith, because the facts involved are not similar. But it was ruled in the *Price Case* that the appointment of a receiver is not the only *desideratum* in any case, but is only ancillary to some other action having some definite relief in view, and the petition filed in the circuit court in the instant case, as epitomized in the opinion of the Court of Appeals, discloses that the appointment of a receiver was the only *desideratum* contemplated.

Certiorari.

WRIT QUASHED.

Smith & Percy for relators.

(1) The trial court had jurisdiction as a court of equity to appoint a receiver for a corporation that was without directors or officers and whose assets were in instant danger of dissipation. *Price v. Bankers Trust*

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Co., 178 S. W. 749. The simultaneous resignation of all officers and directors who at once abandoned the property of the corporation, in the face of attachment suits and levies, being made in many states, and the peril of complete loss of the assets of the corporation, creates such an exception to the general rule that a court of equity, upon having such a state of facts properly called to its attention, will not hesitate to appoint a receiver. 4 Pomeroy's Eq. Jur. (4 Ed.) p. 3630, sec. 1545; High on Receivers (4 Ed.) pp. 350-1; Beach on Receivers (2 Ed.) p. 455; Tardy's Smith on Receivers (2 Ed.) p. 717; Clark on Receivers, p. 233; Lawrence v. Ins. Co., 1 Paige Ch. 587; Thompson v. Greeley, 107 Mo. 577, 586; Ford v. Ry. Co., 52 Mo. App. 439, 448; Boyle v. Sup. Court, 176 Cal. 671; Note L. R. A. 1918 D, p. 229; Re Belton, 47 La. Ann. 1614, 30 L. R. A. 648; Brick Works v. Trust Co., 157 Ind. 292, 87 Am. St. 207; Bent v. Saw Mill Co., 43 L. R. A. (N. S.) 720; Boothe v. Mining Co., 55 Wash. 167, 19 Ann. Cas. 1255, 1258. (2) Where the jurisdiction of a court to hear and determine a case rests upon the facts, the supervisory court will not, by prohibition, preclude such court from determining its jurisdiction from the facts, and after it has determined its jurisdiction from the facts, will not interfere, for the reason that such matter then becomes mere error and can be reached by appeal. State ex rel. v. Shields, 237 Mo. 329; State ex rel. v. Mills, 231 Mo. 493, 500. Where the circuit court has jurisdiction of a general class of cases to which the suit sought to be prohibited belongs, the writ of prohibition will not lie to prevent its exercise merely because of the incapacity of a petitioner to maintain the proceeding, an erroneous ruling by the trial court in that regard, being reviewable like any other error. State ex rel. v. Ry. Co., 100 Mo. 59. (3) Even though a petition in a receivership suit fails to state a cause of action and the showing made to obtain the appointment of the receiver is defective, nevertheless, prohibition will not lie at the instance of a resident creditor who has been

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cited for contempt, for having filed suit against said corporation in another state after the appointment of the receiver. State ex rel. v. Scarritt, 128 Mo. 331, 337.

(4) Where the trial court has power to deal with the subject-matter, it has the power to decide whether the pleadings are properly drawn or not, and whether the plaintiff is entitled to relief shown or not, and its jurisdiction is not impaired by any consideration of whether it acted correctly or erroneously. Schubach v. McDonald, 179 Mo. 163, 182.

(5) In the trial court, where pleadings often need amendment, the determinative question, when prohibition is invoked, is not one of mere pleadings but the question of jurisdiction in its strictest sense. State ex rel. v. McQuillin, 262 Mo. 256, 266, 269.

(6) The statutes make no provision for holding a stockholders' meeting instantaneously (unless all the stockholders consent and waive notice). Where there are no officers or directors, seven days' notice is required and the call for the meeting must be by two stockholders. The rule is not otherwise, even though one stockholder holds fifty-one per cent of the stock and his stock is held in trust by three trustees. Secs. 9724-6, R. S. 1919.

G. T. Priest for respondents.

(1) The first general rule laid down by the court in its opinion is that it is jurisdictional for a court of equity to take cognizance of a petition by a stockholder, asking relief, concerning internal domestic affairs of his company, that the petition must show some effort on the part of the stockholder to remedy the condition complained of. The last controlling decision of this court on this point is *Vogeles v. Punch*, 205 Mo. 558, which so holds. (2) The second general rule laid down by the court in its opinion is that the appointment of a receiver is ancillary to some main proceeding or cause of action. It is dependent upon some justiciable right in issue between the parties plaintiff and defendant; that a

pure receivership proceeding is unknown to our practice. The last controlling decision of this court upon this point is *Price v. Trust Co.*, 178 S. W. 745, which so holds. (3) The third general rule of law laid down by the Court of Appeals in its opinion is that a court of equity may in cases of extreme necessity appoint receivers. The court cited the case of *Thompson v. Greeley*, 107 Mo. 577, and quoted language to that effect. The court, in applying the foregoing general principle of law to the facts found by it, held: First, that the circuit court had no jurisdiction to appoint a receiver, because the petition showed on its face that the stockholders had failed to make any effort to remedy the condition they complained of; that if they had so acted, being the majority stockholders, they could have remedied the condition without applying to a court of equity. Second; that the petition filed in the circuit court by the plaintiffs therein disclosed no main cause of action or right for decision by the circuit court, to which the appointment of a receiver of the corporation was ancillary. The court held that the petition showed on its face that it was a pure receivership proceedings and nothing else. Third, that the petition for appointment of receivers by the stockholders, because of the abandonment of the corporation by its officers and directors filed the day after the alleged abandonment, did not show a condition of extreme necessity warranting the appointment of a receiver. (4) So long as the Court of Appeals announces in its opinion correct rules of law, as laid down by this court, this court cannot interfere with the judgment reached; except that the Court of Appeals reaches a different conclusion upon an identical or similar state of facts heretofore ruled upon by this court. This court has no power or authority to inquire into correctness of the judgment on the record, as found by the Court of Appeals. *State ex rel. v. Broadus*, 216 Mo. 343. (5) The Court of Appeals may be in error in holding that the petition filed by the stockholders in the

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circuit court does not show jurisdictional facts in relation to the effort the law requires stockholders to make towards remedying the evil they complained of before applying to a court of equity for the relief asked and the incidental appointment of a receiver, but this court cannot review the opinion of the Court of Appeals on this point, for so to do would be to attack the judgment of that court collaterally. If the Court of Appeals has erred, it has erred as a matter of judgment on the record before it and not because it has refused to follow the opinions of this court. State ex rel. v. Reynolds, 213 S. W. 808. (6) Upon the precise point involving the precise questions of fact before the Court of Appeals, its opinion is one of first impression in this State. There is no opinion by this court involving identical or similar facts, and that is why it was impossible for the opinion of the Court of Appeals to be in conflict with any opinion of this court, as a result of the misapplication of correct principles of law. State ex rel. v. Farrington, 272 Mo. 162.

ELDER, J.—Relators seek by writ of *certiorari* to quash a judgment entered by the St. Louis Court of Appeals in an original proceeding in prohibition brought at the relation of George T. Priest against John W. Calhoun, Judge, which judgment restrains and enjoins the respondent judge from proceeding further in the suit of J. H. Conrades et al. v. Blue Bird Appliance Company, pending in the Circuit Court of the City of St. Louis, in which suit the said judge had theretofore appointed a receiver for the said Blue Bird Appliance Company. The death of respondent herein, the Honorable GEORGE D. REYNOLDS, having been suggested, this cause has been revived against the Honorable CHARLES H. DAVES, successor judge of the St. Louis Court of Appeals.

The facts in the proceeding in prohibition, which are most relevant to this review, are thus stated in the opinion of the Court of Appeals:

"It appears that on May 25, 1920, John H. Conrades, Thomas Mellow and Ben G. Brinkman were by the Circuit Court of the City of St. Louis appointed receivers of a certain corporation known as the Blue Bird Manufacturing Company, and that said receivers took charge of all of the assets of the said company under their powers as receivers of said company, and that amongst said assets were fifty-one per cent of all of the capital stock of a corporation known as the Blue Bird Appliance Company, a Missouri corporation.

"On June 19, 1920, said John H. Conrades, Thomas Mellow and Ben G. Brinkman, as receivers of the said Blue Bird Manufacturing Company, and as such owners of fifty-one per cent of the capital stock of the Blue Bird Appliance Company, filed a suit in the Circuit Court of the City of St. Louis, wherein said receivers asked for the appointment of a receiver for the said Blue Bird Appliance Company, and upon the same day a temporary receiver was duly appointed and qualified. Thereafter the court, on August 20, 1920, appointed a permanent receiver, upon the giving of a bond in the sum of \$25,000, which bond was on the same day filed, presented and approved by the court, since which time the judge of the circuit court, respondent herein, has retained jurisdiction of the said case continuously, and the receiver, since the date of his appointment as permanent receiver, and up to the time of the filing of the application for a writ of prohibition herein, has continued in charge of and in control of the property of the said Blue Bird Appliance Company.

"The main allegations set out in the petition of the said Conrades et al., receivers of the Blue Bird Manufacturing Company, and as such holders of fifty-one per cent of the capital stock of the Blue Bird Appliance Company, in which petition the appointment of a receiver for the said Blue Bird Appliance Company is sought (as appears from the respondent's return herein) are:

“ ‘A. The plaintiffs in said cause were stockholders owning \$5,100, par value, of the capital stock of the defendant corporation, whose total capital was \$10,000, and were also creditors to the extent of approximately \$450,000.

“ ‘B. That the assets of the defendant corporation located in various states were being subjected to attachments suits, levies and other forms of waste, and that all of said assets were in danger of being utterly destroyed and dissipated.

“ ‘C. That all of the directors, officers, managers and executives of the defendant company had, on the 17th day of June, 1920, resigned and abandoned the property and assets of the defendant corporation, and defendant corporation was without any officers, directors, managers or executives.

“ ‘D. That unless a receiver were appointed by the court the value of plaintiffs’ stock in the defendant corporation would be utterly destroyed, and the value of plaintiffs’ claim would be utterly destroyed.

“ ‘E. The prayer was for the appointment of a temporary receiver, an inquiry by the court into all the facts alleged, the appointment of a permanent receiver and for all general and equitable relief that to the court under the circumstances might seem meet and proper.’

“On October 19, 1920, a petition in bankruptcy was filed in the United States District Court for the Eastern District of Missouri by certain creditors against the Blue Bird Appliance Company. One of the grounds of alleged bankruptcy of the said Appliance Company set forth in the bankruptcy petition is the appointment of a receiver for the said Blue Bird Appliance Company in the cause of Conrades et al. v. Blue Bird Appliance Company, above mentioned.”

The opinion further recites that the application for the writ of prohibition contains averments that the relator Priest is a creditor of the Blue Bird Appliance Company in the sum of \$7500 and had attempted to per-

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fect a lien therefor by attachment proceedings, but that the aforesaid bankruptcy proceeding was designed to defeat the said lien; that although interested in defeating the proceedings in bankruptcy, he (the relator Priest) could not therein attack the appointment of the receiver for the said Blue Bird Appliance Company, as such attack would be collateral, but that the only course open to him was to raise the question of jurisdiction by a direct proceeding; that the circuit court was without jurisdiction to appoint a receiver in the suit of Conrades et al. v. Blue Bird Appliance Company, such lack of jurisdiction appearing upon the face of the petition filed in said cause.

Proceeding, the opinion recites that respondent's return to the preliminary rule issued shows that the relator Priest had been an officer and director of the Blue Bird Appliance Company up to the 18th day of June, 1920, on which day he, with the other officers and directors of the company, had resigned as such officers and directors; that immediately after resigning as officers and directors of the Blue Bird Appliance Company all of the stockholders of that company, except relator Priest (who owned one share) and the aforesaid Conrades, Mellow and Brinkman, receivers of the Blue Bird Manufacturing Company, left the City of St. Louis.

Further matters pertinent to a determination of the contentions of relators herein, as to why the judgment of the Court of Appeals should be quashed, will be adverted to in the course of the opinion.

I. At the threshold of a consideration of the questions presented by relators, let us re-affirm the doctrine which we have firmly enunciated in our most recent pronouncements, to-wit, that in *certiorari* it is not our province to determine whether the Court of Appeals erred in its application of rules of law to the facts stated in its opinion, but only whether upon those facts it announced some conclusion of law contrary to the last previous ruling of this court

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upon the same or a similar state of facts. [State ex rel. American Packing Co. v. Reynolds, 287 Mo. 697; State ex rel. Peters v. Reynolds, 214 S. W. 1. c. 122; State ex rel. Mechanics' Amer. Natl. Bank v. Sturgis, 276 Mo. 559, 208 S. W. 1. c. 462; Majestic Mfg. Co. v. Reynolds, 186 S. W. 1072.]

Relators in their brief assign nine grounds of error, wherein it is alleged that the Court of Appeals failed to follow the last controlling decision of this court. All but two thereof are entirely foreign to the purview of *certiorari*, when measured by the rule above quoted. These two we shall discuss in order.

II. Relators urge that the opinion of the Court of Appeals is in conflict with State ex rel. v. Shields, 237 Mo. 329, and State ex rel. v. Mills, 231 Mo. 493, 500, which hold, as relators say, "that where the jurisdiction of a court to hear and determine a case rests upon facts, the supervisory court will not, by prohibition, preclude such court from determining its jurisdiction from the facts, and after it has determined its jurisdiction from the facts will not interfere, for the reason that such matter then becomes mere error and can be reached by appeal." Both of the foregoing cases were proceedings in prohibition, and while we fully agree with the rule of law there announced, that rule has no relevancy to the case before us for review, for the reasons following.

Different
Jurisdictional
Facts.

That portion of the opinion of the Court of Appeals which is apposite to the contention urged, is as follows:

"Having in mind the general rule that the appointment of a receiver is not the end and object of litigation, but merely a provisional remedy resorted to for the purpose of preserving property involved in litigation, so that the relief awarded by the court, if any, may be effectual (State ex rel. Merriam v. Ross, 122 Mo. 435, 25 S. W. 947; Miller Bros. v. Perkins, 154 Mo. 629, 55 S.

W. 874), does the petition filed below by the receivers of the Blue Bird Manufacturing Company, as holders of fifty-one per cent of the stock of the Blue Bird Appliance Company, contain allegations of fact sufficient to confer jurisdiction upon a court of equity solely for the appointment of a receiver, and not ancillary to other relief sought therein, for a going corporation? In other words, do the facts alleged in the petition bring the case within the exception to the foregoing general rule, namely, that courts of equity have jurisdiction to appoint receivers for corporations, even in the absence of express statutory authority, in cases of extreme necessity for which there is no other adequate remedy? . . .

“Neither the elementary text-writers, when the full context on the subject is read, nor the adjudicated cases, sustain the view that a court of equity has jurisdiction to appoint a receiver for a going corporation upon allegations alone showing that the corporation is temporarily without officers and directors, unless it appears that the circumstances are such that the condition thus alleged to exist is one amounting to a condition of extreme necessity for which the complainants have no other adequate remedy. *A fortiori* would this be true where the petition, though averring that the corporation is without officers and directors, upon its face shows that the complainants are in control of a majority of the stock of the corporation and hence in a position to remedy the matter without invoking the extraordinary power of a court of equity. . . .

“Do then the circumstances outlined in the petition below make out a case of such extreme necessity for which there is no other adequate relief that equity alone can grant adequate relief? We think not. It affirmatively appears that the petitioners below, three in number, were the receivers of the Blue Bird Manufacturing Company, and as such receivers held fifty-one per cent of the total capital stock of the Blue Bird Appliance Company. The relator herein, George T. Priest,

was the owner and holder of one share of the capital stock of the said Appliance Company on the day when the officers and directors of that company resigned, and also on the following day thereafter, when the receivers for the Manufacturing Company filed their receivership petition, and was present in St. Louis at that time. No action whatsoever was taken by the said receivers of the Blue Bird Manufacturing Company, though they were the owners and holders of fifty-one per cent of the stock of the Blue Bird Appliance Company, toward calling a special meeting of the stockholders for the election of a new board of directors, though such action is specifically provided for by our statutes (Secs. 2964-5-6, R. S. 1909). The petition thus clearly fails to exhibit a state of facts from which a court of equity could conclude that the petitioners had exhausted all reasonable efforts to induce corporate action, but on the contrary, conclusively shows that no action whatsoever was taken on the part of those same receivers holding fifty-one per cent of stock toward calling a special stockholders' meeting, or otherwise, but contented themselves, on the very next day succeeding that on which the officers and directors of the company had resigned, with seeking the aid of a court of equity to appoint a receiver, though the statutes specifically provide a method of procedure under such circumstances. And it will be noticed that whatever proper amendments could be made to the petition below, these salient and determinative facts in the case could not be affected thereby."

If the Court of Appeals has erred in holding that the petition did not show jurisdictional facts sufficient to warrant the appointment of a receiver, it erred as a matter of opinion, and on *certiorari* we have no authority to quash its judgment on that ground. [State ex rel. American Packing Co. v. Reynolds, *supra*; State ex rel. Wahl v. Reynolds, 272 Mo. 588.] Moreover, even though the Court of Appeals may have misapplied the rule announced in the Shields and Mills cases, *supra*, to the

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facts before it, such misapplication does not constitute error cognizable in this proceeding, as the facts here are in no way analogous to the facts in the Shields and Mills cases, and no conflict can therefore be engendered. [State ex rel. Commonwealth Trust Co. v. Reynolds, 278 Mo. 695, 213 S. W. 804.] Furthermore, although the Court of Appeals, by its judgment, may have interfered with the action of the circuit court, after that court had determined and assumed jurisdiction upon the facts before it, nevertheless, by reason of the dissimilarity of facts in the cases cited, it cannot be said that there is a contrariety of opinion as insisted.

The point made must accordingly be ruled against relators.

III. Relators also contend that the opinion of the Court of Appeals is in conflict with *Price v. Trust Co.*, 178 S. W. 745, 749, which case relators claim holds "that a court of equity has jurisdiction to appoint a receiver for a corporation which has no officers or directors and whose property is threatened with sale, waste or dissipation."

To sustain this claim relators cite the following passage from the *Price Case*, opinion by FARIS, J., l. c. 749:

"If there were an allegation that the Arcadia Country Club had no officers or directors to conserve its interests and protect its property, we can see readily why a court of equity would interpose in the event of a threatened sale of the property of the club by a mortgagee under an invalid or doubtful incumbrance. But there is a full complement of officers and directors of the Arcadia Country Club existing, and acting for aught that is said or appears. Nor does it appear that the Bankers' Trust Company is in possession of the property or any of it, which it is threatening to sell under its deeds of trust which are alleged to be without consideration, or void for that they are based on notes the

making of which were acts *ultra vires*. On the contrary, the club, or the vendees of the 118 lots not reserved, but included in the deed of trust, seem to be, and for aught which appears to the contrary are, in possession thereof."

From a perusal of the entire case above mentioned, it will be apparent that the paragraph cited is *obiter dictum*; and a reading of the paragraph itself shows that the opening statement is made *arguendo*. Moreover, a further examination of the opinion will reveal this language:

"It is fundamental that there is neither in law nor in equity any such thing as a plain receivership action, i. e., an action in which a receiver is the only *desideratum*. In short, the appointment of a receiver by a court of equity, except in rare cases arising out of lunacy or infancy, is ancillary wholly to some other action having some definite relief in view. [State ex rel. v. Ross, 122 Mo. 435, 25 S. W. 947, 23 L. R. A. 534.] The receiver is 'the hand of the court' used to protect the property and to prevent waste, or to hold the property *in statu quo* pending the decreeing of the relief which is the crux of the case brought; so it necessarily follows that, absent a cause of action stated in the main case, there is no ground for the appointment of a receiver. [Cantwell v. Lead Co., 199 Mo. 1; 97 S. W. 167; Pullis v. Pullis, 157 Mo. 565, 57 S. W. 1095.]"

And a reference to the petition in the instant case, which is epitomized in the opinion of the Court of Appeals, discloses that a receiver was the only *desideratum* contemplated thereby. Hence the judgment of the Court of Appeals, instead of being contrary to the Price Case, is consonant therewith. Furthermore, the Court of Appeals in its opinion, quotes at length, as authority for its ruling, passages from the Price Case which are declaratory of the doctrine that where there is any other adequate and complete remedy a receivership is precluded. And finally, even though the opinion of the Court of Ap-

peals may be inconsistent with anything said in the Price Case (which is contrary to our belief), there is no conflict therewith for the reason that the facts involved therein are not similar to the facts here.

IV. As said hereinbefore, other reasons are assigned by relators in behalf of the relief sought. Were the case here on appeal or writ of error they might have some relevancy, but in an application for *certiorari* they have none. In a proceeding of this character the scope of our inquiry has been well determined, and unless the judgment of the Court of Appeals contravenes some prior ruling of this court, we will not interfere.

After a careful review, we find no merit in the errors urged by relators. It follows, therefore, that the writ herein was improvidently granted and should be quashed.

It is so ordered. All concur.

THE STATE ex rel. MORRIS RUSSELL WOLFE v.
MISSOURI DENTAL BOARD.

In Banc, July 22, 1921.

1. **MANDAMUS: Motion to Strike Out Parts of Return: Judgment on Pleadings: Irrelevant Matter.** In mandamus, where relator has filed a motion to strike out a portion of the return, which is taken with the case, the court, having overruled the motion, will proceed to consider the case upon a motion for judgment on the pleadings, but disregarding all irrelevant matter, whether it appears in the petition or return.
2. **DENTIST: Registration and License: Discretion of Board.** Under the Dental Act of 1917 (Laws 1917, p. 252 et seq.) the Missouri Dental Board has a discretion to grant or withhold a certificate of registration to an applicant therefor. But said certificate having been granted and recorded, the board has no discretion while it is in force to withhold the annual license when a request therefor and the payment of one dollar are made. Said act declares that an

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applicant who shall have received a certificate of registration showing that he is qualified to practice dentistry, upon request and the payment of one dollar to said board, shall be entitled to a license at the time the certificate is issued and annually thereafter. The applicant is not required to submit to an examination upon his application for an annual license, but his qualifications are determined by an examination given prior to the issuance of his certificate of registration, which vouches for his educational and moral qualifications, and the annual fee of one dollar for his license or a renewal thereof is nothing but a fee and serves no substantial purpose other than as a contribution to the secretary. [Overruling closing paragraph of opinion in *State ex rel. Wolfe v. Missouri Dental Board*, 282 Mo. 1. c. 303, in so far as it indicates that any discretion is lodged by the statute in the board to withhold a license or a renewal license to an applicant whose certificate of registration is in force and pays the fee of one dollar.]

Held, by JAMES T. BLAIR, C. J., dissenting, with whom DAVID E. BLAIR, J., concurs, that as Section 12636, Revised Statutes 1919, expressly provides that the board may revoke a license "or refuse to grant a license" if the applicant has been guilty of the publication or circulation of any fraudulent or misleading statements as to the skill or method of any licensee or operator, or when a dentist advertises himself "as a practitioner without causing pain," the board may refuse to renew the license of a duly registered dentist who has been guilty of these things.

3. ———: ———: ———: *Stare Decisis*. A mandamus suit brought in the Supreme Court to compel the Missouri Dental Board to issue a license to relator is not a second appeal, but a new case. But even on second appeal, after the case has been tried on the basis of the ruling on the first appeal, the court reserves the right to correct its former ruling. What was said in the former suit of *State ex rel. Wolfe v. Missouri Dental Board*, 282 Mo. 1. c. 303, to the effect that the board had a discretion to withhold an annual license to a registered dentist was an inadvertence, and related to the issuance of the certificate of registration, or to a trial for the revocation of the certificate and the license, and in so far as it may be understood as a holding that the board is invested with a discretion to withhold a license to a registered dentist should be corrected, and is corrected upon a full review of the whole statute. *Held*, by JAMES T. BLAIR, C. J., dissenting, with whom DAVID E.

BLAIR, J., concurs, that the decision in the former case of *State ex rel. Wolfe v. Missouri Dental Board*, 282 Mo. 292, is well supported by Section 12636, Revised Statutes 1919, and is sound law.

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4. ———: ———: **Invalid Revocation of Certificate: Refusal of License: Mandamus.** Where the order of the Missouri Dental Board revoking the certificate of registration of a dentist has been nullified by the Supreme Court, the board cannot thereafter refuse the applicant a license without a further hearing, and if it refuses to issue to him a license on the ground that said annulled order is still in force, it will be compelled by mandamus to issue to him a license annually so long as his certificate of registration is in force and he pays the annual license fee.

Held, by JAMES T. BLAIR, C. J., dissenting, with whom DAVID E. BLAIR, J., concurs, that Section 12636, Revised Statutes 1919, authorized the board to "refuse to grant a license" to an applicant, though a duly registered dentist, who, since the attempt to revoke his certificate of registration, has been guilty of the things denounced by said section.

5. ———: ———: ———: **Other Grounds for Withholding License.** The Missouri Dental Board cannot withhold an annual license from a duly registered dentist on the ground that his conduct has been ineffectual and otherwise in violation of the dental statutes, without first giving him a hearing; for, if authorized to exercise a discretion at all, the board must first hear and determine whether the applicant has violated the statutes and the court only passes upon the board's record, and a refusal to renew the license without a hearing would be arbitrary, and the board cannot arbitrarily refuse a license and then ask the court to adjudge him guilty of having done the things which the board in its return charges constituted a violation of the statutes.

Held, by JAMES T. BLAIR, C. J., dissenting, with whom DAVID E. BLAIR, J., concurs, that Section 12636, Revised Statutes 1919, expressly authorizes the board to revoke a license "or to refuse to grant a license "if the applicant has been guilty of "the publication or circulation of any fraudulent or misleading statements" as to his skill or methods, etc.; and where the board in its return to the writ of mandamus specifically charges that relator, since its former order revoking his certificate of registration was nullified by the court, has been guilty of the things denounced by said statute and because of said violations it refused to renew his license, and he moves to strike out said part of the return as being irrelevant and said motion is taken with the case, and he thereupon files a motion for judgment on the pleadings, thereby admitting said charges and a subsequent violation of the law, the writ should not be made permanent, but relator's admissions show that the board did its duty when it refused to renew his license.

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Mandamus.**WRIT GRANTED.***Frank M. Lowe* for relator.

(1) Mandamus is the proper remedy to insure relator the relief sought. State ex rel. Hagerman v. Drabbe, 191 S. W. 694; State ex rel. McCleary v. Adcock, 206 Mo. 550, 105 S. W. 271. (2) The law now being considered, except and only as to Section 5493 and Section 5495, Laws 1917, has never been construed or considered by any appellate court. (3) The certificate of registration is the only authority which an applicant must have that requires any examination, or is granted or issued upon any requirement on the part of the applicant to do anything except, in applying for a license, he must pay one dollar. A certificate of registration means that the holder has passed the examination required under the law, and that the Missouri Dental Board after such examination, has been satisfied with such examination as to qualifications and moral character, and that the holder of such certificate is qualified to practice dentistry. The law provides that such a one, after receiving his certificate of registration (Sec. 5487, Laws 1917) shall apply to and receive from said board, a license, and there isn't a word giving to the dental board any discretion, nor is there a single solitary requirement exacted of the holder of such certificate. This is the original license; the one that this relator obtained on the 23rd day of November, 1917. (4) Section 5489 (Laws 1917), provides that after a person shall have received a certificate of registration, then upon request and the payment to said board of one dollar, the applicant shall be entitled to a license. In the first provision found in Section 5487, the language of the act is that having obtained a certificate of registration such person shall receive a license, and there is no mention of the

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payment of even one dollar. (5) Section 5491 provides for the renewal of licenses, and as that is our case, surely if anywhere, we will find here some law giving to the respondent the right to exercise its discretion and refuse as it did in this case, the issuance of such renewal license. Under this provision the respondent has no discretion in the matter of the issuance of a renewal license. A man once having obtained a license can demand as a matter of right a renewal of it. Par. 8, sec. 5493, Laws 1917. (6) If the position taken by the respondent is the law, then every dentist in Missouri can be denied a license without trial, and prosecuted, convicted and sent to jail for failure to obtain a license. This relator has a certificate of registration. This court has held that he never was given a trial, and yet the respondent insists that he has been tried and convicted by it and his license revoked, and that under the law he cannot obtain a license.

Arthur N. Adams for respondent.

(1) This court having construed the dental law in a former case between the same parties and the same question being involved, that case is the law of this case and the question is *res adjudicata*. State ex rel. Wolfe v. Missouri Dental Board, 282 Mo. 292; Chouteau v. Gibson, 76 Mo. 38; Turnverein v. Hagerman, 232 Mo. 693; Kansas City v. Land Co., 260 Mo. 395; Harrison v. Jackson County, 187 S. W. 1183. (2) A correct interpretation of the dental law, considering the whole act and the purpose of the Legislature in passing it, gives the Missouri Dental Board a discretion in granting or refusing to grant renewal licenses. State ex rel. Wolfe v. Missouri Dental Board, 282 Mo. 292; State ex rel. Williams v. State Dental Board, 228 Mo. 1; State ex rel. Hathaway v. Board of Health, 103 Mo. 22; State ex rel. Granville v. Gregory, 83 Mo. 123; State ex rel. v. Goodier, 195 Mo. 551; State ex rel. v. St. Louis, 158 Mo. 514; State ex rel. v. Jones, 155 Mo. 576; Sec. 12636, R. S. 1919; State v. Doerring, 194 Mo. 398; State ex rel. Rosenblatt v. Heman,

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70 Mo. 451. (3) The refusal to grant a license by the dental board is not a taking of property without due process of law. *State v. Davis*, 194 Mo. 501; *State ex rel. v. Goodier*, 195 Mo. 551; *State v. Doerring*, 194 Mo. 398; *State ex rel. v. McIntosh*, 205 Mo. 637. (4) Since relator has openly violated the law, by practicing dentistry without a license, he ought not to be heard to complain of the action of the board in refusing him a license. *State v. Doerring*, 194 Mo. 398; *State ex rel. Hathaway v. Board of Health*, 103 Mo. 30, 15 S. W. 322; *State ex rel. v. McIntosh*, 205 Mo. 589.

GRAVES, J.—Original action in mandamus. Relator avers that in November, 1916, he, after an examination by respondent herein, received a certificate of registration as a dentist, and thereafter on November 23d, 1916, he received from said Missouri Dental Board a certificate in the form of a license, being numbered 4530: that in November, 1918, he received from respondents his renewal license, likewise numbered 4530. The petition then avers:

“Relator informs the court that ever since November 30, 1918, he has been entitled as a matter of right, under the law, to an annual renewal license, as provided by law, and that he has made application therefor, requesting the respondent to issue to him such annual license, and upon each occasion has sent the fee of one dollar as provided for under the law; but without any lawful reason or excuse, and in violation of the mandatory provisions of the law, the respondent has refused and still refuses to issue to this relator the annual license to which under the law as a matter of right, he is entitled.”

The petition then sets out in some detail the history of a former case between these parties, and the result thereof. [*State ex rel. Wolfe v. Missouri Dental Board*, 282 Mo. 292, 221 S. W. 70.] He then avers that after the judgment in that case he tendered the fees for a renewal license, and that he has been at all times refused a re-

newal license on his certificate of registration. He sets out the letters from respondent's secretary returning his fee each time, and showing the refusal to issue to him a renewal license. There is much other matter alleged as occurring between relator and a member of the Dental Board, which can be noted if found material. In one letter from a secretary of the respondent it was stated that relator's renewal license had been revoked. We state this to explain fully the following prayer of relator's petition. This prayer reads:

"Wherefore, the premises considered, relator prays the court to issue its writ of mandamus to the end that respondent may be compelled:

"1. To set aside any order made revoking the renewal license granted to the relator for the year 1918.

"2. That respondent be compelled to set aside any order made at any time finding this relator guilty of any charges, for the reason that the court decided that the relator had never been lawfully put upon trial.

"3. That the respondent be compelled to issue to this relator a renewal license for the year 1921, in accordance with the application made by this relator, November 1, 1920."

Return was duly made to our alternative writ, which involves some matters which are perhaps beyond the real questions in the case. Motion was made to strike out these, which motion was taken with the case, and the case is before us upon a request for judgment upon the pleadings. The return contains a number of admissions, and also pleads fully respondent's theory of the case here previously. Notwithstanding the lengthy pleadings upon both sides there are under paragraph two of the return such admissions as will shorten very much the opinion in the case. In the previous case *State ex rel. Wolfe v. Missouri Dental Board*, it appears that the respondent therein had attempted to try Wolfe upon charges, and had found him guilty and revoked both his certificate of registration, issued in 1916, and his renewal license issued in November, 1918. Respondent

admits that this court held that Wolfe had not been tried according to law, and that their order revoking such instruments were void. Admits further that relator has tendered his fee of one dollar for renewal licenses to November, 1920, and November, 1921, and that they have been refused. There is no pretense that relator had been tried on any charges by said board since the disposition of the case in 282 Mo. 292, *supra*. Other details will go with the opinion.

I. Many details in the instant case will be found in State ex rel. Wolfe v. Missouri Dental Board, 282 Mo. 292, 221 S. W. 70 et seq. Charges had been preferred against Wolfe and a futile trial followed. Up to this time Wolfe was not only a registered dentist, but held the usual annual license. Both his certificate of registration and his annual license were revoked by respondent on June 11, 1918. After going over the whole case, this court, thus ruled:

"The result of the whole matter is that we hold respondent's order revoking relator's certificate of registration *and license* to be void for the reasons stated in paragraphs 1 and 2."

Pending the case, *supra*, in this court, Wolfe was arrested for practicing dentistry without license, and convicted in the lower court. This case was appealed to Division Two of this court, and that court ruled, on the strength of State ex rel. Wolfe v. Missouri Dental Board, *supra*, that the judgment of the said Dental Board was void. [State v. Wolfe, 283 Mo. 29, 222 S. W. 1. c. 442.] The judgment so declared void reads:

"The Missouri Dental Board, therefore, on the facts above found and stated, and on motion duly made and seconded and carried, hereby revokes the original certificate of registration issued to the said Morris Russell Wolfe and the license issued to him by the Missouri Dental Board under which he is now practicing dentistry, and from henceforth said original certificate of registration and said license to practice dentistry

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issued to him by this board are hereby revoked and for naught held."

So that it appears that by the judgments in these two cases the judgment of the Missouri Dental Board was wiped from their record, and both the certificate of registration and the license remained in full tact for all purposes of the law. It is true that the license, which is a document issued annually, had expired, for the full period of its term was at an end. Shortly after the decision in *State ex rel. v. Missouri Dental Board*, 282 Mo. 292, 221 S. W. 70, *supra*, the relator Wolfe having established the legality of both his certificates of registration, and his last license, applied for a renewal license. It was useless for him to apply sooner. Our opinion came down April 1st, 1920, and it is admitted that on May 17, 1920, the relator tendered the fee of one dollar and applied for a renewal license. Such license, had it been issued, would have run to November, 1920. It is also admitted in the return that on November 1st, 1920, the relator did make application for a renewal license from November, 1920, to November, 1921, and tendered the fee of one dollar. To the first application, *supra*, the Missouri Dental Board, through its secretary replied:

"Your letter requesting license and in which was inclosed one dollar received.

"I am herewith returning to you the one dollar for the reason that the Missouri Dental Board refuses to grant you a license to practice dentistry in the State of Missouri, because you have violated the Missouri Dental Law concerning dentistry; because you have published fraudulent statements as to your skill as a dentist; because you have circulated fraudulent statements as to your skill as a dentist. Because you have published and circulated misleading statements as to your skill and method of practicing dentistry; because you have published and circulated by letter circulation, newspaper, card or otherwise holding yourself out to the public as a practitioner without causing pain; because you have acted

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in this manner with a view of deceiving and defrauding the public; because you have violated the provisions of the act of the Legislature of 1917, concerning dentistry, beginning at page 252 and ending at page 268; because you have advertised that you could do dental work by mail; because after due notice given you and trial heard, you have been found guilty of the above charges by the Missouri Dental Board."

This court had previously ruled that relator had not been given a legal hearing, and yet the Missouri Dental Board, in the face of our ruling, was asserting their judgment by reiterating the old charges against relator, and closing with the language: "*because after due notice given you and trial heard* [the very thing this court said had not been done] you have been found guilty of the above charges by the Missouri Dental Board."

This letter does not prefer new charges against the relator, but reiterates the charges previously made, and the previous judgment of the board thereon, which judgment, this court had declared void. To the second application he received this reply of date November 11, 1920:

"Your letter containing one dollar received. I am very sorry to say that according to the records of the Dental Board your license is revoked. Therefore, I am returning your draft for one dollar."

Here again the Missouri Dental Board was asserting its judgment, when it had been declared void in Court in Banc, and on June 4, 1920, by Division Two in the criminal case. With persistency this board has clung to its judgment, in open defiance of the rulings of this court holding that it was void. No further charges have been lodged against Wolfe, and no trial given him upon further charges, or the previous charges, since we held the judgment of the board void. Respondent now clings to the theory that the issuance of the renewal license is a matter of discretion. When all the rubbish is eliminated from both petition and return, this is the simple issue in the case.

It stands undenied that relator has a certificate of registration, for we declared void the judgment revoking it. It stands undenied, that relator had his initial license, and had a license to practice in 1918, because we annulled the judgment revoking such license. So cleared of feeling (and there appears much of such on both sides) the real issue involved is a very simple one. We have thus eliminated the chaff from the wheat without action on the motion to strike out parts of the return. We are not bound by irrelevant matters in the pleadings, whether it appears in petition, or return. For the disposition of the case, we shall overrule the motion to strike out, but reserving to ourselves the right to eliminate from consideration all irrelevant matter in both pleadings. This we have done in the statement, *supra*, as to the material facts, and the simple issue left for decision. Relator has asked that, if we overrule the motion to strike out, we then consider the case as on motion for judgment on the pleadings. This we shall do, and the material facts we have garnered, *supra*, from such record.

II. If the granting of a license to a registered dentist is not discretionary, then this board should be compelled to issue the license requested by relator. Relator is a registered dentist, because this court declared void the judgment and order of the Missouri Dental Board, which revoked it. Respondent hangs all hopes on the last paragraph of the opinion of our recent brother, WILLIAMSON, in *State ex rel. Wolfe v. Missouri Dental Board*, 282 Mo. l. c. 301, 221 S. W. l. c. 73. It is there stated that this board had a discretion in the mere matter of issuing a license. This paragraph of the opinion was not really necessary to the case in hand, but I fear we misconstrued the Act of 1917 (Laws of 1917, p. 252) in stating that there was any discretion as to the mere issuance of a license. This calls for a review of the act. Judge WILLIAMSON in the previous case with becoming modesty said: "The statute can hardly be regarded as a model of lucidity." May I, with less modesty, be permitted

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to add that the Act of 1917 is a model of verbosity, tautology, redundancy, and prolixity. All essentials of this lengthy act could be stated with clarity in a few concise sections, and the law made intelligible. One of the chief objects of the law is to get the cash with which to run the Missouri Dental Board. To this end we have two fees to be paid before a qualified citizen can (as he must under the act) place his name plate, in letters not less than two inches high, on the front door of his dentist's office. First, he must apply for and obtain an examination by the Missouri Dental Board, which application must be accompanied with a fee of \$25. This fact is emphasized by the \$25 prerequisite appearing five times in the act. If the applicant fails and wants another examination, a ten-dollar bill must be dropped into the till of the Missouri Dental Board. Then for fear the Missouri Dental Board would run out of funds, the law requires the applicant, after he has been examined and given a certificate of registration, which certificate vouches for his educational and moral qualifications to practice dentistry, and before he can practice under his certificate of qualification (or registry as the law calls it), to get a license from the Missouri Dental Board, and pay one dollar therefor. [Sec. 5489, Laws 1917, p. 256.] This license must be renewed on or before November 30th of each year, and casually the applicant must drop into the till of the Missouri Dental Board one dollar, each time. [Sec. 5491, Laws 1917, p. 257.] No examination is required for this license. It is a fee proposition, pure and simple. It serves no substantial purpose other than the contribution annually of the dollar to the secretary of the Missouri Dental Board. True it must be posted in the office, but the posting of the certificate of registration would serve the same end, because it bespeaks the qualification of the party. The whole trouble in this case is occasioned by the requirement of these two instruments from the dental practitioner. The distinction between the two was overlooked in the remarks made in the last paragraph of our pre-

vious opinion. The certificate of registration is the instrument issued after a satisfactory examination. It is in the granting or refusing of instruments of this kind that the courts have ruled that there was a discretion in the examining board. But even this is not an unregulated discretion. It is one which may be reached by the courts. Arbitrary action can always be reached through the courts. [State ex rel. v. Adcock, 206 Mo. 550.] The relator in this case passed his examination and received not only his certificate of registration (which he now holds, untarnished, by virtue of our previous ruling) but also his license to practice. It is a renewal license that he seeks in the instant case. Is he entitled to it? We think so. By Section 5487 of the Act of 1917, page 254, it is provided:

"From and after the passage of this act it shall be unlawful for any person to practice dentistry in the State of Missouri or to attempt, or to hold himself or herself out as a dentist until said person or persons shall first comply with the following requirements: be examined and registered by said board, and after receiving a certificate of registration the person receiving the same shall file such certificate of registration with the clerk of the county court of the county or counties in which he or she resides or desires to practice dentistry, and shall have the same recorded and a certificate showing the filing and recording of the same, with the book and page where recorded endorsed thereon under the hand of the clerk and the seal of said court; *and thereafter any such person shall apply to and receive a license from* said board, which license shall attest the qualifications of the person named therein and shall give the person named therein the right to practice dentistry for the term mentioned in said license, which term in all cases shall end on the 30th day of November of each year, and shall be dated on the date such license is issued."

Note the language "and thereafter any such person *shall* apply to and receive a license from said board." The word "shall" should be supplied before the word

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“receive,” supra. At the end of this same section it is said “he must procure from the board . . . a license.”

Section 5489 of the Act of 1917, page 256, says: “After a person shall have been registered and shall have received a certificate of registration showing that the applicant is qualified to practice dentistry in this State, then *upon request of such person and the payment to said board of the sum of one dollar* the applicant shall be entitled to a license, authorizing the applicant to practice dentistry and dental surgery in the State of Missouri under this act.”

Again note the language, “*shall* be entitled to a license,” and he is thus entitled “upon request . . . and the payment to said board of the sum of one dollar.” This is the first or original license issued after the party has been examined, found qualified, received his certificate of registration, and had such certificate recorded in the county of residence. There is no discretion to be found in the language used as to this first license. Why should there be a discretion, since the Missouri Dental Board had just examined the party and found him qualified for the practice and morally fit for the profession? Bear in mind that the certificate of registration must be recorded within six months after its issuance, or it becomes invalid. [Sec. 5492, Laws 1917, p. 256.] So that there was no reason to grant discretion to the board in issuing a mere license, when it must so shortly follow the complete examination of the party.

We now come to the law as to renewals of this original license. It is found in Acts of 1917, Laws 1917, page 257, Section 5491, which reads:

“All persons who have been regularly registered and licensed as dentists under the provisions of this act shall be entitled to have their license renewed upon application to said dental board on or before the 30th day of November in each calendar year next succeeding the expiration of the license then held by such applicant. All applications for renewal of license, as herein pro-

vided, shall be accompanied with a fee of one dollar, and each new license so issued shall be kept and displayed, as herein provided for original licenses."

Is there discretion lodged in the board in the performance of this act? We say not. The law says applicants for a renewal license "*shall be entitled to have their license renewed*" upon the payment of a fee of one dollar. Of course the applicant must be regularly registered and previously licensed before he is entitled to a renewal license. If the applicant is duly registered and has been previously licensed, then the law says such "*applicant shall be entitled to a license.*" There is no discretion found in this language. If the prerequisites exist, the renewal license must follow the application, as the night follows the day.

The only thing in the entire act indicating discretion in the issuance of a mere license is this found in closing portion of Section 5495d., Laws 1917, page 263: "After the applicant has been granted a certificate of registration showing the applicant to be entitled to a license, then the applicant, upon application to the board, may be licensed and authorized to practice dentistry as provided by this act."

The foregoing refers to the initial license just after the examination, and the issuance of the certificate of registration. It does not affect relator's case, even if it be conceded that the initial license was within the discretion of the board, a matter we do not concede. This Section 5495d is largely a rehash of Section 5487, the mandatory language of which we have set out in the first place. Relator is duly registered and received his initial or first license. What he wants is a renewal license, and this, under Section 5489, *supra*, is not a matter of discretion.

Why should there be discretion in the mere issuance of yearly licenses? As said, the whole tenor of the act indicated that the real purpose of renewal license is to get one dollar each from the dentists of the State in order to keep the Missouri Dental Board and its work

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going. In this feature it differs from the law governing doctors and lawyers. With dentists the certificate of registration is the instrument that bespeaks qualification educationally and morally. As long as that document is in the hands of the dentist, his moral and educational qualifications are vouched for by the solemn judgment of the Missouri Dental Board. The law simply requires that the applicant for a renewal license shall be a person duly registered and previously licensed by the Missouri Dental Board, and that he accompany his application with one dollar. [Sec. 5491, *supra*.] Upon what is discretion to be exercised? The records of the board show the registration and initial license, and it requires but a glance at the records to determine whether these facts exist. If they exist, the board cannot say they do not exist. [State ex rel. v. Adcock, 206 Mo. 550.] There is no place for discretion there. If the application for renewal is accompanied with the dollar, that fact is before the board, and there is no room for discretion there. If this law required of the applicant for a renewal license the making of some showing as to his work under his certificate of registration and previous license, or some showing as to his then moral and educational standing, or some showing as to his conduct under the ethical standards of the profession, then there might be a discretion lodged in the board. But the law makes no such requirements. He is only to make application for such license and accompany the same with one dollar. There is no place for discretion.

In the issuance of a certificate of registration, and in the revoking of such certificate, or a license issued thereunder, after a trial, there is no doubt more or less discretion lodged in the Missouri Dental Board, but this is not an unregulated discretion. [State ex rel. v. Adcock, *supra*.] In the mere issuance of a renewal license, there is no discretion, under the Act of 1917, now Chapter 112, Revised Statutes 1919. The closing paragraph of the opinion in State ex rel. Wolfe v. Missouri Dental Board, 282 Mo. 292, 221 S. W. 1. c. 73, in so far as it indi-

cates that there was a discretion, is wrong. An examination of the whole act does not sustain it.

III. It is urged that the rule, as to discretion, announced in the previous case, is *stare decisis*, or *res adjudicata*. Counsel use the words *res adjudicata*. This is not a second appeal, but a new case. But even upon second appeal, and where the case has been retried *nisi* on the basis of a ruling by this court, we have reserved our right to correct our ruling on second appeal. [*Mangold v. Bacon*, 237 Mo. l. c. 513 et seq.] We feel that what was said in the former opinion was an inadvertence, which should be corrected upon a thorough review of the whole act. The remarks were applicable to the certificate of registration, or to a trial for the revocation of it, or a license issued thereunder, but not to a mere renewal application, and the license to be issued on same. Had the law required the application for a renewal license to make a showing with his application, the question might be different. If it requires no showing, as indicated in a previous paragraph, then there is no place for the exercise of discretion.

IV. It will be noted that, in the foregoing we have not considered that portion of the return by which respondents undertake to justify their act by pleading that relator has violated the dental statutes, as to advertising and other things. We did this for several reasons, viz: (1) This portion of the return was wholly irrelevant in this action. In mandamus in this court we are not called upon to first determine the facts of a violation of law authorizing action upon the part of the board. The board must first hear and determine the matter (if authorized to exercise a discretion) and we pass upon their record. There is no claim in this return that relator had been heard on any charges since the trial which we held void. The action of refusing would be arbitrary, unless relator had been given a hearing by the board. Such board cannot arbitrarily refuse the license, and then undertake to have this court determine the

facts in the first instance as is sought to be done in the instant case. For this reason we dismissed these portions of the return as wholly irrelevant to the issues involved here. (2) There is another more forceful reason for excluding this portion of the return. Since the last trial in this court, the only action taken is evidenced by the two letters from the secretary of the board, in which the action of the board is placed upon the ground that their records (the judgment which this court vacated) showed that relator's license had been revoked upon charges covering all the things mentioned in the return. Respondents cannot blow hot and cold. Their record shows that their refusal was based upon their old judgment, and not otherwise. (3) Section 12636 urged, if it were in this case at all, does not go to the extent claimed by respondent's counsel. This section says: "Said dental board shall have power to revoke a certificate of registration or a license issued thereon upon any one of the following causes:" There follow eight specific grounds or causes upon which a revocation of certificate of registry or of license may be ordered. But not that the power conferred is to revoke something already done, and to revoke for cause, and upon a hearing as provided for by the next section. The power granted is to revoke something already done, and not to refuse to act, for the reasons stated. It is true that there is added to the 8th sub-divisions of causes for which the certificate of registration or license may be revoked, a statement that they may be refused for the same reasons. This can only refer to the original certificates of registration, and the initial license issued thereunder. It can not refer to a mere renewal license, without nullifying all the remainder of the law.

It follows that our alternative writ of mandamus should be made absolute, and it is so ordered. All concur, except *J. T. Blair, C. J.*, who dissents in separate opinion, and *D. E. Blair, J.*, who concurs in the opinion of the Chief Justice.

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JAMES T. BLAIR, C. J. (dissenting).—The return in this case expressly states that the reasons respondent refused to renew relator's license were that after November 30, 1918, he "continued to practice dentistry in Kansas City, Missouri, without a license and without any authority so to do in open defiance of the law, and continued to publish false and fraudulent statements and is still doing so; respondent says relator, during the time he has been practicing dentistry, has published false statements as to his skill as a dentist and has circulated fraudulent statements and has published and circulated misleading statements as to his skill and method of practicing dentistry, and has held himself out to the public as a practitioner without pain, and has advertised that he could practice dentistry by mail. Respondent in the exercise of its discretion refused relator his license because he has continued to practice dentistry without a license and continued to advertise false and fraudulent statements." The return clearly shows that these charges against relator do not pertain to his practice without a license during the life of the license which the board unsuccessfully attempted to revoke, and shows that the board does not allege or contend that the license in question in the previously decided case was not valid until the time fixed for its expiration under the statute. The illegal practice alleged is that done by relator since the expiration of the license dealt with in the decision in the former case.

The allegations of the return are not denied by relator. They must be considered as admitted by the pleadings. Section 12636, Revised Statutes 1919, expressly provides that the dental board may revoke a license "*or refuse to grant a license*" if the applicant has been guilty of "the publication or circulation of any fraudulent or misleading statements as to the skill or method of any *licensee* or operator," or when a dentist advertises himself "as a practitioner without causing

pain, or advertising in any other manner with a view to deceiving or defrauding the public, or in any way that will tend to deceive or defraud the public."

It therefore appears that it is charged in the return and admitted by relator that relator did the things because of which the statute authorizes the board to refuse a renewal license to relator. That this section is not confined to the original license quite clearly appears. It is specifically made applicable to "licensed" dentists and to a "licensed or registered dentist." This language shows the section cannot well be construed to apply only to the original license. It authorizes the board to refuse a license for reasons which could hardly arise until after the dentist has once been licensed and has been engaged in the practice. For instance, the license may be refused: "If such license or registered dentist shall employ or permit any person not regularly registered and licensed to practice dentistry to practice the same in the office or under the control or direction of such licensed or registered dentist;" or, "In case any dentist should fail, neglect or refuse to keep his office and dental equipment in a thoroughly clean and sanitary condition." These clearly indicate that it was the renewal license which was authorized to be refused. In the majority opinion it is now said that the admitted facts which, under the statute as I now construe it and as this court unanimously construed it in *State ex rel. Wolfe v. Dental Board*, 282 Mo. 292, 221 S. W. 70, show relator's guilt of the things which authorize the board to refuse to license him, are wholly irrelevant. First, it is stated that this court is not called upon "first to determine the facts of a violation of law authorizing action upon the part of the board. The board must first hear and determine the matter (if authorized to exercise a discretion) and we pass upon their record." This argument is intended as an answer, even though it be assumed that the board has a discretion under the statute and that the pleadings show the averment in the return and the admission by the motion which would war-

rant a refusal of the desired license. It has no bearing if the statute is to be construed as previously done in the majority opinion, since that construction would end the matter. The parenthetical clause recognizes this as the hypothesis upon which the argument is made. So far as this argument is concerned, therefore, it is to be examined in the light of relator's admission that he has been guilty, subsequent to November 30, 1918, of acts which warrant the board in refusing him a renewal license. It is said the board must accord him a hearing and that the fact that he has not had one precludes consideration of his admission of guilt. The difficulty with this is that relator has sought no hearing. He not only has asked for none but, as the return charges and relator admits, he has refused to cease his admitted violation of the law and has refused so much as to discuss such a cessation, and announced, through his attorney, that the reason for his refusal was that he was "so well loaded that" he wanted to "show his hand." The result of the position taken by the majority in this connection is, therefore, that though it be conceded relator is guilty of acts which justify the board in denying him a renewal license and that the statute gives them a discretion in such a case, yet relator can escape the penalty the law requires to be imposed and compel the board to renew his license, guilty though he be, by the simple expedient of refraining from asking for a hearing and refusing to have the matter of his guilt considered by the board at all. That relator could have required the board to grant him a hearing may be conceded. That he can refuse to have the matter determined by the board and thereby put himself in a position to compel the board to give him a license despite his admitted infractions of the law, and thus deprive the board of the power which the statute vests in it to deny a license because of the things he admits he has done, does not seem to me to be a tenable position. Yet that is what the majority opinion means in the argument set out above.

It is also argued that the letters written by the secretary of the board show the refusal to renew relator's license was grounded upon the finding of the board which was held void in our previous decision. The license dealt with in that case expired November 30, 1918. The return in this case avers and relator admits that the violations of the law upon which respondents now stand were committed "after November 30, 1918." Paragraph III of the return makes it entirely clear that the misdoing relied upon by the board to justify its refusal to renew relator's license occurred after the date mentioned. It says so in so many words. It is true that the letter of May 22, 1920, mentions the alleged trial and finding held void in our previous decision, but it includes, also, many general charges of violations of the dental law. The other letter merely states that the records of the board show relator's license has been revoked and that his dollar is therefore returned. These letters do not justify the holding that is made that they conclusively show that the sole reason for refusing the renewal license was the previously made void effort to hold a hearing. But suppose they did. Relator now admits that he had frequently, if not continuously, violated the law since the hearing to which the opinion refers. Since this is true, what difference does it make even if the board did, in May, 1920, assign an unsound reason for refusing then to renew the license? The subsequent course of relator was a continuance of the violation for which the futile attempt to try him had been made. A mistake in a letter in May would not deprive the board of the power to act upon subsequent offenses in November, if otherwise it had power to act. It will hardly be contended that the letter of the secretary early in November is of great consequence. Again, though the effort to try relator in 1918 was futile and the revocations based upon the attempted finding then made were void, this did not render the violations which the board then attempted to examine any less efficacious

to sustain a subsequent refusal to renew relator's license. The fact the violations had occurred, if they did, would just as well support such refusal after the futile hearing had been had as it would have done before. The implication in the majority opinion that because the effort to *try* relator proved to be fruitless, therefore his misdeeds were wiped out entirely and could not be thereafter considered by the board at all, introduces a new conception of the effect of proceedings had without jurisdiction.

So far as concerns the argument under (3) in Paragraph IV of the majority opinion, the statute furnishes the answer and this has already been considered.

With the facts admitted as charged and the powers of the board such as shown by the statute quoted, I am unable to agree to the majority opinion. Relator has not shown any arbitrary or oppressive action by the board. He admits facts which show it did its duty when it refused to license him. He admits he refused to take up the matter of his misconduct and even discuss it with the board.

The majority opinion seems to place too much stress upon general language used in sections of the statutes other than Section 12636. This statute expressly gives discretion to the board. Its particular provisions cannot be held destroyed by general language used elsewhere unless well known canons of construction are to be abandoned.

It may be added that the decision which the majority opinion overrules is well supported by Section 12636 and, in my opinion, is sound law.

Very respectfully I dissent. *David E. Blair, J.*, concurs in these views:

FRANK ALBERS v. CITY OF ST. LOUIS, Appellant.

Division One, July 23, 1921.

1. **BOULEVARD: Shifting Cost by Widening Street: Cancellation of Tax Bills: Corruption.** Charter provisions requiring the expense of opening a boulevard to be borne in part by the city and in part by property abutting thereon cannot be evaded by the enactment of an ordinance for widening a street but in fact establishing a boulevard, and thereby shifting the city's part of the expense of its construction upon property not subject to assessment for boulevard purposes; and where the city's part of such expense has by the subterfuge of enacting a widening ordinance been shifted to property not abutting on the street and therefore under the charter not subject to assessment to pay the cost of constructing a boulevard in such street, the owner of such property may maintain a suit to cancel the tax bills; and such a suit may be maintained without an allegation or showing that there was bribery or corruption in connection with the enactment of the widening ordinance and the proceedings thereunder. [Following *Albers v. St. Louis*, 268 Mo. 1. c. 357 et seq.]
2. ———: ———: ———: **Notwithstanding Judgment in Condemnation: Collateral Attack.** Notwithstanding the fact that the circuit court had rendered judgment in the condemnation proceeding establishing the boulevard and approving the assessments against the owner's property, such owner can maintain a suit to cancel the tax bills issued to pay such assessments, if they were made contrary to charter provisions.

Appeal from St. Louis City Circuit Court.—*Hon. Victor H. Falkenhainer*, Judge.

AFFIRMED.

Charles H. Daues and *H. A. Hamilton* for appellant.

(1) The city had the right to repeal Ordinance 22948 and abolish the boulevard therein provided for prior to the time it had actually been condemned and

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opened as a boulevard. *St. Louis v. Christian Brothers College*, 257 Mo. 541. (2) In opening a street the city had the right to determine the width thereof, and its legislative discretion in so determining is not subject to review. *St. Louis v. Brown*, 155 Mo. 555. (3) There is no evidence of fraud in the enactment of Ordinance 24224 providing for the opening of Kingshighway north-east. (4) The court exceeded its jurisdiction in this case in vacating and setting aside the entire judgment in the case of *City of St. Louis v. James E. Baker*, and in declaring said judgment, which included the condemnation of the land, null and void. (5) The judgment assessing benefits in the case of *City of St. Louis v. James E. Baker* in the circuit court was a final judgment fixing the benefits chargeable against the property assessed, and said judgment is not subject to collateral attack in this proceeding. *St. Louis v. Belle Place Realty Co.*, 259 Mo. 126; *Searcy v. Clay County*, 176 Mo. 493; *Vrana v. St. Louis*, 164 Mo. 146; *Buddecke v. Ziegenhein*, 122 Mo. 243.

Wm. L. Bohnenkamp and Benjamin H. Charles for respondent.

(1) The questions of law decided on the first appeal are the law of the case. *Gracey v. St. Louis*, 221 Mo. 1; *Benton v. St. Louis*, 248 Mo. 98; 15 R. C. L. sec. 430, p. 953. (2) The charter fixed the benefit district for the creation of a boulevard, confining it to lands fronting or bordering thereon. *St. Louis Charter*, art. 6, sec. 1 (*Rombauer's Code* 1912, p. 352). (3) The petition charged, the evidence established and the court found, that Kingshighway Northeast (Bircher Street) was widened and opened as a boulevard. No benefit district, therefore, other than that established by the charter could lawfully be designated; and no property outside of such district could be deemed to be benefited, nor assessed. *Albers v. St. Louis*, 268 Mo. 349; *St. Louis v. Realty Co.*, 259 Mo. 136. (4) There is no conclusive

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presumption that the increase of width in Bircher Street was merely to widen that highway as a street. It may be shown, and was shown in the evidence, that this widening was designed by the city to create a boulevard without complying with the boulevard provisions of the charter. The courts will look through any sham. *Albers v. St. Louis*, 268 Mo. 349; *Kansas City v. Hyde*, 196 Mo. 498, 513; *Kansas City Gas Co. v. Kansas City*, 198 Fed. 515. And the courts will not tolerate abuses of power. 22 L. R. A. (N. S.) 173; *Bennett v. Marion*, 106 Iowa, 628, 632; *Albers v. St. Louis*, 268 Mo. 349. (5) The repealing ordinance (24,224) under which the boulevard was in fact sought to be established was void, as found by the trial court, because it attempted to carry out a boulevard proceeding under the guise of a mere street widening. *Albers v. St. Louis*, 268 Mo. 349; *St. Louis v. Brinckwirth*, 204 Mo. 305, 306; *St. Louis v. Realty Co.*, 259 Mo. 126. (a) The city counselor's notice that a benefit district had been established by commissioners appointed by the circuit court was therefore void, because the ordinance itself under which the proceeding was instituted was void, and because also the commissioners had attempted to establish a benefit district for a boulevard not authorized by the charter. (b) The judgment rendered in a proceeding brought under a void ordinance is itself void.

JAMES T. BLAIR, J.—The city appeals from a judgment of the circuit court which cancels certain special assessments against parcels of land owned by respondent. These assessments purported to be levied as part of the cost of the widening of Bircher Street. The case was here before on an appeal from a judgment for the city, following the trial courts action in sustaining the city's demurrer to the petition. [*Albers v. St. Louis*, 268 Mo. 349.] This court held the petition good and reversed the judgment and remanded the cause. On the hearing which followed that remandment the

trial court found the facts to be as alleged in the petition and canceled the special assessments, as stated. Appellant offered no evidence. The evidence offered by respondent proves the allegations of the petition considered in the opinion on the former appeal, and a reference to those allegations will, therefore, be substantially sufficient to disclose the facts of this record.

In brief, to recapitulate, the petition alleges, the evidence shows and the trial court found that the city undertook to open and improve a rather elaborate boulevard from the river on the south side of the city around the western limits and to the river again on the north side of the city. Kingshighway Northeast was to constitute a part of this boulevard, and it included Bircher Street, then a little used street, sixty feet wide, in a sparsely settled residence district, upon which there was but scant traffic and that of a sort found in such communities. The principal use was by a comparatively small number of delivery wagons which served the people of the neighborhood. Under the boulevard scheme the width of Bircher Street was to be increased to two hundred feet. A service roadway and two pleasure driveways were to be constructed, and parkways, with trees, etc., and sidewalks were to occupy the remainder of the two hundred feet. This plan conformed Bircher Street to the general boulevard scheme. Its name was to be changed and it was to become a part of Kingshighway Northeast.

Under the charter the expense of opening the boulevard was required to be borne in part by the city at large and in part by the property abutting on the boulevard. To pay the city's part of the expense the people of St. Louis voted bonds for \$500,000. These bonds were then sold and the money became available. Thereafter, the major portion of this half million dollars was expended for purposes outside those for which the people voted it. About \$263,000 was expended for parks and some of these were adjacent to Kingshighway North-

east. The amount thus expended would have been much more than sufficient to pay the city's share of the expense of transforming Bircher Street into the proposed boulevard. As a result of these unauthorized expenditures from the fund voted by the people the city found itself without the funds necessary to complete the payment of its part of the cost of opening the boulevard as planned. It had no power under the charter provisions respecting the opening of boulevards to assess benefits against lands not abutting upon the boulevard. Parts of the boulevard had been opened according to the original plan, and the city had paid its share of the expense for some of these. In this situation the idea was hit upon to repeal the boulevard ordinance as to certain sections first included in it but which there was no money left to open under the charter provisions respecting boulevards, and then proceed to "widen" the streets along which these unfinished sections ran. Under the charter provisions respecting the "widening" of streets the benefit district might be made to include property other than that abutting on the street so widened. In furtherance of this the boulevard ordinance was repealed in so far as it affected Bircher Street and an ordinance was passed for "widening" that street, and, incidentally, for changing its name to Kingshighway Northeast. By the widening ordinance there was proposed to be accomplished a result identical with that which would have been accomplished had Bircher Street been transformed into a boulevard under the original boulevard ordinance affecting it. The ordinances, plats and the testimony of the then city officials and of experts show that the actual result of the carrying into effect of the proceedings for "widening" Bircher Street is to transform it, in fact, into a boulevard and into the same boulevard, in kind and character, which would have resulted had the city proceeded under the original ordinance and paid its share of the expense, as the charter required, of establishing such boulevard. Under the

street widening ordinance a boulevard in fact is established, but the city's responsibility for its part of the expense in establishing it is evaded by subterfuge. Respondent's lots do not abut upon the improvement. The evidence is indisputable that there was no traffic need for the change. This also tends to prove that the intent of the second ordinance was to evade the charter provisions. This statement of the evidence in part supplements and in part is supplemented by the facts which appear in the former opinion as allegations, but which, as stated, are now shown to be proved and were so found by the trial court. These facts were held on the former appeal to be sufficient, if proved, to require the cancellation of the assessments against respondent's property. [Albers v. St. Louis, 268 Mo. l. c. 357 et seq.] The points made on this appeal are substantially the same as those pressed on the former appeal. The former decision is the law of the case, and we do not find in the brief any insistence, directed against the former opinion, which did not have consideration in that opinion. We adhere to that decision.

It is said there is no evidence of bribery or corruption in connection with the ordinance and proceedings upon which the street widening proceedings depend. There is neither contention nor holding that there was anything of that kind. The question is whether by subterfuge the charter provisions respecting the opening of boulevards have been evaded and a boulevard in fact established and its expense, in part, illegally assessed against property not subject to assessment therefor under the charter of the city, and the city, by that subterfuge and evasion, enabled to shift its financial burden to the shoulders of its citizens.

Complaint is made that the trial court set aside the judgment in *City v. Baker* in which the assessments against respondent's property were approved and confirmed. The very purpose of this proceeding is to cancel these assessments. The power of the court to cancel

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them in this case on the facts which appear was affirmed in the former decision. The reasons are set forth in the opinion then delivered. The net result of the judgment on this trial is the cancellation of the special assessments mentioned, and the effect of that opinion and this is that the judgment in *City v. Baker* does not afford a cover which will protect these assessments against cancellation. This matter also is decided, in effect, in the former opinion, and no sound reason for abandoning that holding is advanced or occurs to us.

The judgment is affirmed. All concur, except *Elder, J.*, not sitting.

HARRY C. MORROW v. JOHN E. FRANKLIN, Appellant.

Division One, July 23, 1921.

1. **FRAUD AND DECEIT: *Scienter*: Allegation Tantamount to Knowledge.** *Scienter* means knowledge on the part of the person making representations, at the time they are made, that they are false, and in actions of fraud and deceit it is necessary to allege and prove the *scienter*; but it is not necessary to expressly allege that the defendant knew his representations upon which the action is based were false; it is sufficient if the language used is tantamount to an allegation of knowledge that they were false; it is sufficient if the petition charges that the representations were false, were made by defendant himself, and therefore necessarily known to him, that they were "knowingly" made and done for "the fraudulent purpose of deceiving the public," and especially should such allegations be held to be a sufficient plea of the *scienter* after verdict, where no demurrer to the petition was filed and its insufficiency was first raised by an objection to the introduction of testimony.
2. ———: **Several False Representations: Proof of One.** Where several false representations are charged to the defendant, any one of which is sufficient to constitute an action for fraud and deceit, substantial proof of any one of them is sufficient to carry the case to the jury.

3. ———: **Sale of Stock: Fictitious Sale of Railroad.** Evidence that the president of a trust company sold its stock to plaintiff at \$190 per share with the assurance that its book value was \$200, at a time when the company was insolvent, the result of happenings through years, carefully concealed by fictitious and imaginary profits and the payment of dividends never earned; that the said president told plaintiff, prior to purchase of the stock, that the company had sold for subsequent delivery a railroad, financed and built by it, at a profit of one million dollars, whereas in fact he had only given an eighteen months' option on the road; and that this railroad was one of the chief factors in the ultimate wreck of the trust company, is sufficient, in an action of fraud and deceit, to submit to the jury the issue whether the sale of the stock to plaintiff was induced by the false representations of its president that the company was in a solvent and prosperous condition and the book value of its stock was worth what he said it was, these facts being sufficiently pleaded.
4. ———: ———: **Evidence: Value at Time of Sale: Subsequent History of Corporation.** In an action of fraud and deceit based on the fraudulent sale of the stock of a corporation at a false and fictitious value, the value of the stock at the date of the purchase is the value to be considered in determining the damages, but the subsequent history of the corporation and the conditions and rapid fall in the price of its stock thereafter may be shown as throwing light upon the value at the time of the purchase, especially where there was no radical change in the real assets and liabilities of the company during the subsequent months up to the time of its failure, and the defendant had in writing represented to plaintiff that he had "inside knowledge of the company's affairs." And such evidence being proper, it is not error to instruct the jury that the real value at the time of the purchase may be ascertained "in the light of the subsequent events in the history of the company."
5. ———: ———: **Presumptive Knowledge of Directors.** In an action for fraud and deceit brought against the president of a trust company for fraudulent representations in the sale of its stock, at a price far above par, at a time when it was in fact insolvent and its stock had been given a fictitious book value, it is not erroneous to instruct the jury that "it is the duty of a director of a trust company to ascertain the value of its assets and the amount and extent of its liabilities, and the law presumes that a director is familiar with the surplus and profits and the intrinsic value of its assets and the amount of its liabilities." The statute (Secs. 1131, 1133, R. S. 1909) imposes upon directors of trust companies the duty of knowing their exact status, and the law presumes that they perform that duty. Besides, in this case, such instruction, if

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technically erroneous, was harmless, because defendant in a letter to plaintiff, prior to the sale of the stock, said he had "inside knowledge of the affairs of the company."

6. ———: ———: **Trust Company.** It is the duty of directors of a trust company, made so by statute, to know its financial condition, the value of its assets and the extent of its liabilities at the time they offer its stock for sale, or induce others to buy it from other stockholders.
7. ———: ———: **Reliance Upon Statement of Directors: Access to Books.** A stockholder of a trust company, employed in its place of business, with a legal right to examine its books, has a right to rely upon the statements and representations of its officers and directors, and is not bound to examine the books for himself before purchasing its stock.
8. ———: ———: **Printed Circulars.** Directors of a trust company are liable to a purchaser of its stock for false representations of its financial condition contained in printed pamphlets and circulated with their knowledge for the purpose of inducing people to purchase.
9. ———: ———: **Representations of Fact.** Positive statements concerning the present or past earnings of a corporation, or the value of its stock, or the value and soundness of its assets, or the amount of its liabilities, made by its officers and directors, are not mere expressions of opinion, but representations of fact upon which a prospective purchaser of its stock has a right to rely.
10. ———: ———: **Measure of Damage.** The measure of damages, in an action of fraud and deceit, based on a sale of the stock of a corporation, induced by the false representation of its president as to its value, is the difference between the value it would have had if such representations had been true, and the real value at the time of the purchase. Nor is it error to instruct the jury that such real value may be ascertained "in view of the subsequent events in the history of the company" where the subsequent history of the company is properly admitted in evidence.
11. ———: ———: **Expressions of Opinion: Refusal to Withdraw From Jury.** Statements made by defendant, the president and director of a trust company, sued for fraud and deceit based on false statements as to the value of stock sold to plaintiff, that the company could continue indefinitely to pay a four per cent quarterly dividend, that if plaintiff bought its stock at \$190 per share he could sell it in six months at a profit or advanced price, that the stock would by the next January be worth \$300 per share, and that the company could be liquidated in twelve months and the sum of \$200

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per share paid to the stockholders, if they stood alone, would be mere expressions of opinion, but made in connection with representations as to the value of the stock and the condition of the company and its assets and made for the purpose of strengthening those representations and as a part and parcel of them, it was not error for the court to refuse to give instructions withdrawing them from the jury's consideration; and in view of the fact that the court in other instructions told the jury what statements were statements of fact and not mere opinions, and further told them explicitly what representations would authorize a verdict for plaintiff, in which no mention was made of these statements, the refusal to withdraw them even if considered mere expressions of opinion, was at most harmless error.

12. —: **Action At Law: Weighing Evidence on Appeal.** An action of fraud and deceit, brought by the purchaser of stock of a corporation for damages, based upon the false representations of the defendant as to its value, is an action at law, and if there is substantial evidence to support the verdict of the jury, its weight is not for the consideration of the appellate court, however sharp are the issues of facts presented; but, the case being without error committed in the trial, the judgment approved by the trial court will be affirmed.
13. **INSTRUCTION: Assumption of Fact.** An instruction beginning, "If you find false statements were knowingly made," does not assume as a fact that such statements were made.

Appeal from St. Louis City Circuit Court.—*Hon. Thomas C. Hennings, Judge.*

AFFIRMED.

John A. Hope for appellant.

(1) The point that the petition does not state facts sufficient to constitute a cause of action was raised when we objected at the beginning of the trial to the introduction of any evidence; again at the conclusion of plaintiff's evidence, when we requested the court to instruct the jury that under the pleading and the evidence, plaintiff could not recover; and again at the conclusion of all the evidence, when we asked a similar instruction. Even if we had not thus raised the point, it is not waived,

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as the learned trial judge seems to have erroneously assumed. Such a defect is incurable; it can be raised for the first time in the appellate court. Sec. 1804, R. S. 1909; *Well v. Greene County*, 69 Mo. 286; *Andrews v. Lynch*, 27 Mo. 169; *Oakes v. School District*, 98 Mo. App. 165; *Clothing Co. v. Watson*, 168 Mo. 133, 143; *Shoe Co. v. Wyble*, 261 Mo. 675, 686. Even if the case were here without a Bill of Exceptions, and on the record proper only, it would nevertheless be the duty of this court to pass upon the sufficiency of the petition. *Shoe Co. v. Wyble*, 261 Mo. 686. (2) The very gist of an action for deceit and fraud is that defendant knew the representations to be false, or that he made them as of his own knowledge when in truth he was conscious of having no knowledge on the subject. This is referred to in the books as the *scienter*. *Dulaney v. Rogers*, 64 Mo. 203; *Bigelow on Fraud*, sec. 3, pp. 56-57. (3) And a petition which, like the one in this case, does not aver the *scienter* is fatally defective. Plaintiff, in his petition, bases his right of action upon representations alleged to have been made to him "in February and June, 1913;" but the petition nowhere contains any allegation that defendants knew the alleged representations were false, or that defendants made the representations as to their own knowledge when they were without knowledge respecting the truth or falsity of the representations. It is true the petition does say that the defendants caused statements of the Trust Company's assets and liabilities, printed in pamphlet and card form, to be circulated and distributed generally to the public "for the purpose of deceiving people and to induce the purchase of stock," etc.; and further, that, "for the purpose of deceiving him and of inducing him to buy stock," defendants "falsely stated to him that the actual value of the stock as shown by the books was \$200 per share." But these allegations are no sufficient averment of the *scienter*. There must be not only an averment that the representations were false, and that they were made for the purpose of deceiving and induc-

ing the purchase, but the petition must go further and aver that defendants knew at the time that the representations were false, or that defendants made the representations as of their own knowledge while conscious at the time they were without knowledge. *Anstee v. Ober*, 26 Mo. App. 668; *Redpath v. Lawrence*, 42 Mo. App. 108; *Walker v. Martin*, 8 Mo. App. 560; *Hoester v. Sammelman*, 101 Mo. 624; *Nichols v. Stevens*, 123 Mo. 96, 117; *Remmers v. Remmers*, 217 Mo. 541, 556; *Cantwell v. Harding*, 249 Ill. 354; *Edwards v. Noel*, 88 Mo. App. 439; *State ex rel. v. Reynolds*, 272 Mo. 558, 593.

(4) Upon plaintiff's own testimony, he had no case, and the court erred in not instructing the jury at the close of the case to return a verdict for defendant. *Bigelow on Fraud*, pp. 29, 30, 11, 12, 14; *Franklin v. Holle*, 7 Mo. App. 241; *McBeth v. Craddock*, 28 Mo. App. 380; *Dowelrymple v. Craig*, 149 Mo. 345; *Davis v. Foreman*, 229 Mo. 47; *Gordon v. Butler*, 105 U. S. 558; *Coal Co. v. Halderman*, 254 Mo. 596. (5) There was no showing of intent that the alleged representations were to be acted on. *Bigelow on Fraud*, p. 1; *Coal Co. v. Halderman*, 254 Mo. 596; *Peters v. Lohman*, 171 Mo. App. 482; 14 Am. & Eng. Ency. Law (2 Ed.), p. 102; *Remmers v. Remmers*, 217 Mo. 557. Plaintiff was a man of at least ordinary sagacity; he took twenty days' time to investigate and consider; books and papers and assets open before him; and he has no case. *Bigelow on Fraud*, p. 18; *Davis v. Foreman*, 229 Mo. 47. Another reason why the foundation of plaintiff's case is so unstable that the verdict should not be permitted to stand, again looking alone to his own testimony, is that his testimony abounds in prevarications. These untruths stand out so boldly in his testimony "that he may run that readeth it." *Moore on Facts*, sec. 1074, p. 1211. (6) The rule is that the evidence must be confined to the value of the assets at or about the time of the transaction complained of; and this rule is particularly applicable in a case like this, where, on account of general

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business conditions over which defendants had on control, values had been constantly declining. This rule, which limits the evidence to values at or about the time of the transaction under investigation, is applicable in all sorts of cases, including deceit, and fraud. Furthermore, the alleged representations of which plaintiff complains were made, according to his petition, "soon after his arrival in St. Louis," which was April, 1913, and in no event after February and June, 1913. 1 Jones on Evidence, p. 853, sec. 168; Markowitz v. Kansas City, 125 Mo. 490; Met. St. Ry. Co. v. Walsh, 197 Mo. 402; Globe Ins. Co. v. C. & A. Railroad, 174 Mo. App. 547; Grant v. Hathaway, 117 Mo. App. 609; Deane v. Houser, 83 Mo. App. 614; Union Natl. Bank v. Hunt, 7 Mo. App. 48; Kerwin v. Friedman, 127 Mo. App. 519; Hewitt v. Price, 204 Mo. 31; State v. Meysenburg, 171 Mo. 34; French v. Fitch, 67 Minn. 495; Addis v. Swofford, 180 S. W. 557. The Westerman-Trader audit should not have been admitted. The purpose of that audit was to ascertain the financial condition of the company on May 11, 1914. It was no evidence of what the assets were in the spring of 1913, nor of their value at the time of the alleged misrepresentations. (7) Instruction 1, given at plaintiff's request, is erroneous, because the jury was thereby told that "the law presumes that a director is familiar with the surplus and profits and the intrinsic value of the assets and the amount of the liabilities of any trust company of which he is a director, and the law presumes in this case that these four defendants were all familiar with the assets and liabilities, the past earnings, surplus and profits of the Bankers Trust Company," and because this instruction said "the law presumes in this case these four defendants were all familiar with the assets, etc." This instruction amounts to a declaration that legal or constructive fraud authorizes a recovery in an action for fraud and deceit, whereas it is an established principal that in such cases legal or constructive fraud will not suffice and that actual

fraud must be proved. *Kountze v. Kennedy*, 147 N. Y. 124; *Bank v. Hutton*, 224 Mo. 42, 70; *Wakeman v. Daily*, 51 N. Y. 29; *Peters v. Lowman*, 171 Mo. App. 465, 482; *Bank v. Byers*, 139 Mo. 627, 652; *King v. Moon*, 42 Mo. 555. The above instruction was also erroneous and misleading because of the use of the term "the intrinsic value of the assets." What does intrinsic value mean? What lawyer even, not to mention the ordinary juror, could give an accurate definition of that term? It should never be used in an instruction; certainly not without a definition of its meaning. Nowhere in the instructions did the court tell the jury what was meant by "intrinsic value" as used in the above instruction. *Bowles v. Hunter*, 91 Mo. App. 337; *Prince v. Compress Co.*, 112 Mo. App. 49, 66; 11 Ency. Pl. & Pr. p. 139; *Jeffries v. Southern Co.*, 88 Va. 869; *Faulkner v. Mfg. Co.*, 79 Ill. App. 544; *Rudd v. Robinson*, 126 N. Y. 117; *Powell v. Conover*, 75 Hun. 11; *Bell v. James*, 128 N. Y. App. 241; 8 *Thompson on Corporations*, sec. 1301; 1 *Bigelow on Fraud*, p. 233; 1 *Sackett on Instructions*, sec. 197, pp. 161-162.

Judson, Green & Henry for respondent.

(1) The petition states a cause of action against Franklin. *Nauman v. Oberle*, 90 Mo. 666; *Arthur v. Wheeler & Wilson Co.*, 12 Mo. App. 335; *Adams v. Barber*, 157 Mo. App. 370; *Hoffman v. Gill*, 102 Mo. App. 324; *Davis v. Central Land Co.*, 143 N. W. 1073; 20 Cyc. 99, 100. (2) Plaintiff's testimony made a case for the jury. Thus, the testimony of plaintiff that this appellant told him the railroad of the Trust Company had been sold at a profit of a million dollars would alone take the case to the jury. But wholly aside from any testimony of plaintiff the books of the Bankers Trust Company, and the fictitious entries of profits made therein by its officers and employees, together with the printed statements of assets and liabilities issued by authority

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of this appellant made a case for the jury. *Bank v. Byers*, 139 Mo. 627. (3) Statements by the president of a bank as to the value of its stock and the soundness of its assets to one who has no knowledge on the subject are actionable statements of fact, and not mere expressions of opinion. 20 Cyc. 18; *Snider v. McAtee*, 165 Mo. App. 260, 178 S. W. 484; *Fall v. Hornbeck*, 132 Mo. App. 595; *Stonemets v. Head*, 248 Mo. 243; *Foundry Co. v. Heskett*, 125 Mo. 532; *Barron Estate Co. v. Woodward*, 163 Cal. 561, 125 Pac. 351; *Hubbard v. Oliver*, 139 N. W. 77; *Houston v. Lumber Co.*, 146 S. W. 1061. (4) The fact that respondent could have examined the books of the bank does not prevent his recovery when he in fact did not examine them, but relied entirely upon Franklin's representations. *Cottrill v. Krum*, 100 Mo. 397; *Bro-laski v. Carr*, 127 Mo. App. 286; *Kerr on Fraud*, p. 81; *Snider v. McAtee*, 178 S. W. 484; *Snider v. McAtee*, 165 Mo. App. 260. (5) The credibility of the witnesses was solely for the jury. *Holzner v. Met. St. Ry. Co.*, 261 Mo. 379; *Fritz & Groh v. Ry. Co.*, 243 Mo. 62; *Turley v. Met. St. Ry. Co.*, 166 Mo. App. 655; *Beckerman v. Jewelry Co.*, 175 Mo. App. 279; *Wallace v. Ins. Co.*, 174 Mo. App. 110. (6) Evidence as to the subsequent history of the Trust Company and the disposition of its assets was admissible as bearing upon the value of the stock when respondent bought it. *Addis v. Swofford*, 180 S. W. 548; *Hindeman v. Bank*, 112 Fed. 936, 57 L. R. A. 108; *Peek v. Derry*, L. R. 37, Chan. Div. 541. (7) Instructions 1 and 7 given for plaintiff are correct under the evidence in this case. R. S. 1909, secs. 1131, 1132 and 1133; *Bank v. Hill*, 148 Mo. 380; *Lyons v. Corder*, 253 Mo. 539; *Finn v. Brown*, 142 U. S. 56; *Houston v. Thornton*, 122 N. C. 365, 373; *Searle v. Baker*, 70 Tex. 289; *McCauley v. Brown*, 99 Mo. App. 625. (8) The words "intrinsic value" did not require any definition. *Addis v. Swofford*, 180 S. W. 556; *Hindeman v. Bank*, 112 Fed. 936. (9) Instruction No. 22 given by plaintiff correctly states the law. *Bank v. Byers*, 139 Mo. 627; *Shin-*

abarger v. Shelton, 41 Mo. App. 147; Hindeman v. Bank, 112 Fed. 936; Addis v. Swofford, 180 S. W. 556. (10) The report of the appraisers selected by Franklin to appraise the property of the Trust Company and the report of the accountants whom he selected to examine its books were admissible in evidence as against Franklin because these men were his agents for this purpose, and their acts and reports in that matter were in law the acts and reports of Franklin himself.

GRAVES, J.—Action for damages based upon alleged fraud and deceit in the sale of certain shares of stock in the Bankers Trust Company by appellant to plaintiff. As originally brought the suit was against five directors of the said Bankers Trust Company, viz., John E. Franklin (the present sole appellant), Charles S. Marsh, Lester S. Parker, Joseph B. Graham and Stephen B. Hunter. Before trial the case was dismissed as to Hunter. Plaintiff had a verdict, in a trial before a jury, for \$103,388.88. This verdict was signed by nine of the twelve jurors. Motions for new trial were filed, and the court sustained such motions as to defendants Marsh, Parker and Graham, but overruled them as to defendant Franklin. After the motions of Parker, Graham and Marsh were sustained, plaintiff dismissed as to these three defendants, so that judgment went against Franklin alone, who is now the sole defendant and appellant. We used the term motions for new trial, because there were (1) a joint motion for new trial, and (2) a separate motion for new trial by each of the four defendants. The vital parts of the petition are short, and we reproduce them:

“All of the said defendants were, during the time hereinafter mentioned, large holders of the stock of said corporation, and some of them were also largely interested in a syndicate or joint partnership which owned or controlled a large amount of stock in said corporation, and all of them were desirous of having the

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market price of said stock maintained at a high level so that their ability to sell the same at a profit or to borrow money thereon might be maintained and increased.

“Plaintiff further says that for several years prior to April, 1913, the said defendants, as directors of the said Bankers Trust Company, had been accustomed to declare and pay to themselves and other stockholders enormous dividends upon its stock, which have not been earned and the payment of which really impaired its capital stock, in violation of the laws of the State of Missouri, for the fraudulent purpose of deceiving the public as to its earnings and in order to inflate the market value thereof; and had also from time to time been accustomed to place or to cause or permit to be placed false and fictitious values upon the assets owned and controlled by said corporation, and knowingly to cause or permit false and fictitious entries on its books of earnings or profits by said corporation, thereby giving to the said stock which they owned, and some of which they had for sale, a highly inflated and fictitious value, and thereby unlawfully paying to themselves large sums in unearned dividends thereon.

“Plaintiff further says that in February and June, 1913, these defendants, for the purpose of deceiving people and to induce the purchase of stock owned by them at fictitious prices, fraudulently caused false statements of audits of the books of the Bankers Trust Company, showing its assets and liabilities, to be printed in pamphlet and card form and circulated and distributed generally to the public in the City of St. Louis and elsewhere, which said pretended statements of the assets and liabilities of the said company were false at the time they were issued, in that they largely overstated the amount and value of its assets and understated the amount of its liabilities.

"Plaintiff further says that prior to April, 1913, he was a resident of Whitehall, Illinois, and was engaged in business at that place; that the defendants herein at that time induced him to come to St. Louis by making a contract with him, by the terms of which he was to take charge of one of the departments of the Bankers Trust Company which handled the promotion of new corporations, and was to become vice-president of the said company, but not a director; but plaintiff says that the real purpose of these defendants in inducing him to come to St. Louis and become connected with the Bankers Trust Company, as aforesaid, was not to have charge of said department under said contract, or any other department, but it was to induce him to purchase from them, and from others, stock of the said Bankers Trust Company at highly inflated and fictitious prices.

"Plaintiff further says that soon after his arrival in St. Louis these defendants, for the purpose of deceiving him and of inducing him to buy stock of the Bankers Trust Company from them and others at a highly inflated and fictitious price, stated and represented to him that if he wished to hold the office of vice-president he should own and hold a large amount of stock in the Bankers Trust Company, and falsely stated to him that the actual value of the stock, as shown by the books, was two hundred dollars per share, and that the company could be liquidated in twelve months and the sum of \$200 a share paid to the stockholders; whereas, in truth and in fact, the said company was then insolvent, and its liabilities exceeded the value of all its assets. They also falsely stated to him that the dividends of twenty per cent per annum theretofore paid on said stock had all been earned and paid out of profits, and that said company was then earning much more than twenty per cent per annum on its stock, whereas, in truth and in fact, said dividends had been paid in whole or in large part out of capital, and the capital of the said company had then been impaired and dissipated and lost through

the payment of said unearned dividends. They also falsely stated to him that a large part of the capital of the company was invested in the San Antonio, Uvalde & Gulf Railroad, which had been built by said Bankers Trust Company, and for the building of which there had been actually paid to the Bankers Trust Company cash bonus amounting to more than one million dollars which amount was a clear profit to said Bankers Trust Company, and that said railroad had been sold for January 1, 1914, delivery, at a clear profit to the company of \$1,000,000, and that it was then upon dividend paying basis and was being operated at a profit; whereas, in truth and in fact, the Bankers Trust Company never received any cash bonus of any kind, nor any other money or property as a bonus for the building of said railroad, and said railroad was then being operated at a large loss, with no prospects of its becoming self-sustaining in the future, and had not then been sold at a profit of \$1,000,000 or at all. They also falsely stated that the market value of the bank's stock then owned by the Bankers Trust Company and the market value of the said railroad owned by it was largely in excess of the value at which they were carried on the books of the said company, whereas, in truth and in fact, the market value thereof was then a great deal less than the value at which they were so carried on the books of the Bankers Trust Company. The defendants also exhibited to the plaintiff the false printed statements of assets and liabilities hereinabove referred to in order to induce him to purchase said stock. Plaintiff says he had no knowledge respecting the said various false statements and representations so made to him by these defendants and the said Bankers Trust Company, except such as he derived from them, and that he trusted implicitly the said statements of these defendants, and in reliance thereon, at their urging, he purchased, in May, 1914, from J. E. Franklin, five-hundred shares of the stock of said corporation at the price of \$195 per share, paying therefor

\$17,000 in cash and giving his negotiable notes for the balance of \$77,500, all of which notes were thereupon immediately negotiated and sold by the said Franklin to innocent purchasers for value. That, relying upon said false representations, and at the suggestion of these defendants, he also purchased, in April, 1914, forty-five shares of said stock from other parties at \$195 per share, paying therefor in cash and notes. Thereafter he collected dividends upon said stock amounting to \$6,000.

"Plaintiff further says that in May, 1914, the said Bankers Trust Company ceased paying dividends, and thereafter a receiver was appointed therefor; whereupon he discovered for the first time the falsity of the aforesaid statements so made to him and that the Bankers Trust Company was in fact insolvent when he bought said stock, and that its stock was in fact absolutely worthless, and had been in fact worthless since the beginning of the year 1913."

Each defendant filed a separate answer, in the nature of a general denial:

The several questions and the pertinent facts therewith connected can best be taken up in the course of the opinion. The errors urged are (1) admitting improper evidence, (2) the giving of improper instructions, (3) refusing to sustain a demurrer to the evidence, and (4) failure of the petition to state a cause of action. Of these in inverse order.

I. Does this petition state a cause of action? This is the first question urged by appellant. No demurrer was filed to the petition, and the point was first raised by an objection to the introduction of evidence under the petition. The appellant says that there is the fatal absence of an allegation of *scienter*. Learned counsel for appellant thus speaks:

"But the petition nowhere contains any allegation that defendant knew the alleged representations were

false, or that defendants made the representations as to their own knowledge when they were without knowledge respecting the truth or falsity of the representations."

We have quoted practically all of the petition. It is true that the petition does not in words aver that defendant *knew* the representations to be false, nor does it allege that the representations were made as if of defendant's knowledge, when in fact he had no knowledge. In actions for fraud and deceit the term "*scienter*" has thus been defined in 12 R. C. L. p. 328: "*Scienter* means knowledge on the part of the person making the representations, at the time when they are made, that they are false, and it is generally held that in an action of deceit *scienter* must be proved."

As a rule that which must be proved, must be pleaded. If *scienter* is a material element in actions for fraud and deceit, then it should be pleaded as well as proven. Thus in 12 R. C. L. p. 420, it is said: "Fraudulent intent must be alleged in all cases where it is a material ingredient of the fraud relied on. In an action of deceit it is proper to allege facts showing knowledge on the part of the defendant that his representations were false, and generally in such an action *scienter* must be alleged, either expressly or by alleging facts which are tantamount thereto."

It is very generally held that in the legal action of fraud and deceit *scienter* is a material element. In this State we adhere to the doctrine that *scienter* is an element necessary to be pleaded and proven in legal actions for fraud and deceit.

In speaking of such actions in the case of *Remmers v. Remmers*, 217 Mo. l. c. 557, we said: "It is essential to state a cause of action of that character to aver that such representations were false and so known to be by the defendant, and that such representations were made with the intention of deceiving plaintiff, and that plaintiff was deceived thereby, and relying upon such promises and representations he was induced to act to his injury."

But whilst this is true, it does not necessarily follow that the pleader must use the words "that defendant knew such representations to be false." It is sufficient if the language of the petition is "tantamount thereto." Especially is this true of a petition which is attacked after verdict, as in the instant case.

To like effect is the rule announced in 20 Cyc. 99, whereat it is said: "Except in those jurisdictions where a *scienter* is not an essential element of actionable fraud, it is necessary that a *scienter* be alleged. It is not always necessary, however, that knowledge of the falsity of the representations be alleged in so many words. Thus allegations that the representations were fraudulently or deceitfully made sufficiently aver a *scienter*, as the word 'fraudulently' or 'deceitfully' excludes the idea of mistake and imports that the representations were made with knowledge of their falsity."

Our own courts have taken the same view, and adopted the rules, *supra*, as announced in R. C. L. and Cyc. Thus in *Arthur v. Wheeler & Wilson Co.*, 12 Mo. App. 1. c. 339, the court said: "Defendant objected to all evidence under the second count, because the petition states no cause of action, inasmuch as it does not allege that the representations made by defendant were known by it, at the time, to be false. As plaintiff in his petition alleged not only that the statement made by defendant was false, but, also, that it was fraudulently made, we think that the *scienter* was sufficiently alleged to support the action for deceit, and that the objection to evidence on this ground was properly overruled."

In *Hoffman v. Gill*, 102 Mo. App. 1. c. 324, the court says: "Defendant insists that as the petition does not allege that the defendant falsely, fraudulently and knowingly made the statements, etc., it is wholly insufficient to support a judgment. The petition charges that 'the defendant corruptly and fraudulently, with the intent to cheat and defraud the plaintiff' etc. This allegation is sufficient in a pleading to charge fraud in any court."

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The question is more elaborately dealt with by NIXON, P. J., in *Adams v. Barber*, 157 Mo. App. 1. c. 385, in this language:

“Appellant assigns as error that the allegations of the petition are insufficient to sustain a judgment for deceit, and that his demurrer to the petition on that account should have been sustained. The petition, after alleging the specific false representations, enumerates them in detail at great length and then proceeds to charge what is commonly called the *scienter*, in these words: ‘Plaintiff further says that said representations so made by defendant were made to the plaintiff fraudulently and intentionally for the purpose of inducing plaintiff to enter into said contract and to make said exchange of his stock of merchandise and fixtures to defendant for said land.’

“The objections appellant makes to this petition are, that plaintiff must allege and prove that the representations upon which his action is based were false; that they were known to be false by the defendant at the time they were made; or that the representations were made by defendant as of his own knowledge when in part he had neither any knowledge on the subject nor any reasonable grounds, to believe the representations to be true; and that the plaintiff’s petition does not come up to these requirements. It will be seen that the specific statements of the petition are ‘that the defendant fraudulently and intentionally for the purpose of inducing plaintiff to enter into said contract’ made said representations. It must be remembered in the discussion of the sufficiency of these allegations to sustain an action for deceit, that this is not an action in equity to rescind a contract procured by fraudulent representations, but an action at law for damages caused by deceit and that under the law a *scienter* is an essential element of actionable fraud. It will be seen by a perusal of the petition that it first sets out the representations made by the defendant and follows this with the allegation that the

plaintiff entered into the contract relying upon the representations of the defendant, and then sets out the inducements and statements made by the defendant to induce the plaintiff not to go to Arkansas and examine the land before making the trade. The words used are that plaintiff 'fraudulently and intentionally for the purpose of inducing plaintiff to enter into said contract' made said representations. The word 'fraudulent' is defined by Webster as follows: 'Using fraud; trickery; deceit. Dishonest. Synonym: Deceitful, fraudulent, guileful, crafty; treacherous; dishonest, etc.,' and while the authorities hold with great uniformity that in action of this kind it is necessary to charge the *scienter*, no express form of words is required to be used for that purpose, nor is it always necessary that the knowledge of the falsity of the representations be expressly stated in so many words. And it has been held that the allegation that the representations were fraudulently or deceitfully made sufficiently avers the *scienter*, as the word 'fraudulently' or the word 'deceitfully' excludes the idea of mistake and imports that the representations were made with knowledge of their falsity. The allegation of an intention to deceive is not always to be made in direct terms. And whilst the plaintiff must, in substance, aver that the representations were made with knowledge of their falsity, this requirement is complied with if from the averments of the petition it can be fairly gathered that the defendant falsely and fraudulently deceived the plaintiff. Especially is this considered sufficient after verdict. [Barber v. Morgan, 51 Barb. (N. Y.) 116; Zabriskie v. Smith, 13 N. Y. 322; Bayard v. Malcolm, 2 Johns. (N. Y.) 550.] In the case of *Nauuman v. Oberle*, 90 Mo. 666, the charge was held sufficient that 'the defendant falsely, fraudulently, and deceitfully represented and guaranteed.' [See, also, *Hoffman v. Gill*, 102 Mo. App. 320, 324, 77 S. W. 146; *Fenwick v. Bowling*, 50 Mo. App. 1. c. 521; *Carr v. Sanger*, 138 App. Div. 32.] Under the authorities cited, the

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charge of the *scienter* in this petition was undoubtedly sufficient, as the allegations charge that the representations were fraudulently made, which implies that they were knowingly made by the defendant in bad faith with knowledge of their falsity.

"Nor does this conclusion conflict with the statement of the law by our Supreme Court in the case of *Remmers v. Remmers*, 217 Mo. l. c. 557, 117 S. W. 1117, that in order to state a cause of action for deceit it is essential to aver that such representations were false and so known to be by the defendant, and that such representations were made with the intention of deceiving plaintiff, and that plaintiff was deceived thereby, and relying upon such promises and representations he was induced to act to his injury. This opinion could not be reasonably construed to mean that the necessary allegations cannot be substantially stated without the use of formal statement, nor that any particular set phrase or formal words are necessary in order to substantially make the charge. The opinion in that case turned on the elements necessary to be stated rather than the sufficiency of their statement. We conclude that the petition is sufficient to withstand the assault after issues joined and especially after verdict."

Defendant relies particularly upon the *Remmers* case, so clearly explained by the Springfield Court of Appeals, in the quotation, *supra*.

So that the only question is to measure this petition by these rules as to sufficiency of pleadings in deceit cases, and determine the matter as to whether or not the language used is tantamount to an express allegation of *scienter*. We think it is. The following paragraphs in the petition amount to a charge of knowledge of the falsity of the alleged statements to plaintiff:

"Plaintiff further says that for several years prior to April, 1913, the said defendants, as directors of the said Bankers Trust Company, had been accustomed to declare and pay to themselves and other stockholders

enormous dividends upon its stock which had been earned and the payment of which really impaired its capital stock in violation of the laws of the State of Missouri, for the fraudulent purpose of deceiving the public as to its earnings and in order to inflate the market value thereof; and had also from time to time been accustomed to place or to cause or permit to be placed false and fictitious values upon the assets owned and controlled by said corporation, and knowingly to cause or permit false and fictitious entries on its books of earnings or profits by said corporation, thereby giving to the said stock which they owned, and some of which they had for sale, a highly inflated and fictitious value, and thereby unlawfully paying to themselves large sums in unearned dividends thereon.

“Plaintiff further says that in February and June, 1913, these defendants, for the purpose of deceiving people and to induce the purchase of stock owned by them, at fictitious prices, fraudulently caused false statements of audits of the books of the Bankers Trust Company, showing its assets and liabilities, to be printed in pamphlet and card form and circulated and distributed generally to the public in the City of St. Louis and elsewhere, which said pretended statements of the assets and liabilities of the said company were false at the time they were issued, in that they largely overstated the amount and value of its assets and understated the amount of the liabilities.”

These preliminary charges in the petition suffice to aver knowledge. The things here charged are things charged to have been done by the defendant himself, and therefore of necessity of his knowledge. The dividends are charged to have been paid for “the fraudulent purpose of deceiving the public.” The false and fictitious entries as to profits are charged to have been “knowingly” done or made. As to false statements of assets and liabilities, it is said they were “fraudulently” made. These statements when taken with the other portions of the petition, make it good after verdict to say the least.

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II. The next vital contention is that this case should never have been submitted to a jury. In other words, that defendant Franklin's demurrer to the evidence should have been sustained. It will not be necessary to review all of the evidence in this voluminous trial record to pass upon this question. As will be noted by an examination of the petition there is more than one false representation charged to Franklin, and if there was substantial evidence upon either the matter was for the jury.

Demurrer to Evidence.

A bit of history is apropos here. In April of 1913, Marsh invited plaintiff, a country banker and business man of Illinois, to come to see them. When he arrived he was turned over to Franklin, and from thence forward the basis of this lawsuit developed. According to a letter written by Franklin to a third party the plaintiff was worth about \$100,000. With the alluring offer of making him a vice-president at a salary of \$12,000 per annum, he was induced to accept a position in a department "to take charge of such underwriting financing, syndicating and other work of this nature that our board of directors may deem it prudent for you to engage in."

He was informed by Franklin that a syndicate formed was to take over stock of the Bankers Trust Company, known as the Tally stock, and he (plaintiff) would be taken in on the ground floor in that coterie of financiers. This was preliminary. He was taken in on that deal. Plaintiff had hardly gotten his desk warm in his new department, when Franklin began to hold out further and greater things before his eyes. He was informed that he was wanted for a director when they elected again, and to that end should have stock. Franklin offered to let him have five-hundred shares of his stock at \$190 assuring him that it could be arranged for him to pay a portion and the other could be carried. This was persistently urged

upon plaintiff from time to time, and it was during these times that the false representations were made to him. The representations ran from the time that plaintiff first talked to Franklin in April, 1913, to the time the stock was finally purchased by plaintiff, upon payment of \$17,500 in cash, and balance in notes. The stock was sold to him at \$190, with the assurance that the book value was more than \$200. In about a year the Bankers Trust Company was in the hands of a receiver, and found to be one of the great financial wrecks of the country. Nor was its ultimate condition the result of happenings during this year, but on the contrary was the growth of years, carefully concealed by purely fictitious and imaginary profits, and by the payment of dividends not in fact earned. But these are just side-lights.

Franklin was the dominating spirit, and Parker and others were rightfully dismissed by the trial court upon the record made.

Going to the question of whether or not this case should have gone to the jury, one instance is sufficient. Plaintiff swears that Franklin represented to him that the San Antonio, Uvalde & Gulf Railroad, a road in Texas, financed and built by the Bankers Trust Company, had been sold "for January 1, 1914, delivery at a profit of \$1,000,000 more than it was carried for on the books of the Trust Company." Franklin denied that he made the statement, but this made it a question for the jury. This statement was a very vital matter, because in April, 1913, this railroad was a millstone around the neck of the Trust Company, and was one of the chief factors in its ultimate downfall, although there were many other factors not necessary to discuss.

If Franklin made that statement as to the sale of this railroad it was false and knowingly false. He had given an eighteen month's option on the road, but this was far from a sale. This matter alone would carry the case to the jury, and we need not burden this opinion as to other matters. All these disputed matters were for the jury

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There was no error in overruling the demurrer to the evidence.

III. The next matter urged is alleged error in the admission of evidence. The trial court permitted evidence of conditions found in the year 1914, which was some months after the sale of stock to the plaintiff. It is urged that the value of the stock at the date of the purchase is the value to be considered in determining the damages in deceit cases. This is true, but it does not follow from this that the subsequent history of the corporation may not throw some light upon the value at the time of purchase, and it is upon this theory that such evidence is competent. Within one year after plaintiff purchased the stock, the corporation passed one of its usual dividends in May, 1914. The next day after the passing of this dividend the stock dropped from \$190 to \$110, the second day after to \$85, and within three months it was selling for \$3 per share. True, defendant's evidence tends to explain this situation, but it was a jury question.

The evidence of the happenings from May 28, 1913, the date of plaintiff's purchase, to the final decease of the corporation sheds much light upon the question of the real value of the stock at the date of the purchase. Especially is this true in the light of the further facts, that there were no radical changes in the real assets and real liabilities of the corporation, during this time, and as said by Franklin in a letter to plaintiff, of date of January 2, 1914, he, Franklin had "inside knowledge of the company's affairs." Some of this subsequent evidence consisted of audits made by parties under the authority and direction of Franklin. In our judgment this evidence was competent as tending to show the value of this stock at the date of the sale. During all this time Franklin and Marsh were unloading their stock, all no doubt occasioned by their inside knowledge. Noth-

ing of this kind appears as to other defendants. We rule this evidence was competent. [Addis v. Swofford, 180 S. W. (Mo.) 548; Hindman v. Bank, 112 Fed. 936; Peek v. Derry, 37 Chan. Div. 541.]

IV. Instruction number one for the plaintiff is sharply criticized. The criticism is thus expressed:

“Instruction 1, given at plaintiff’s request, is erroneous, because the jury were thereby told that ‘the law presumes that a director is familiar with the surplus and profits and the intrinsic value of the assets and the amount of the liabilities of any trust company of which he is a director, and the law presumes in this case that these four defendants were all familiar with the assets and liabilities, the past earnings, surplus and profits of the Bankers Trust Company,’ and because this instruction said ‘the law presumes in this case these four defendants were all familiar with the assets,’ etc.

“This instruction amounts to a declaration that legal or constructive fraud authorizes a recovery in an action for fraud and deceit, where it is an established principle that in such cases legal or constructive fraud will not suffice and that actual fraud must be proved.”

Said instruction reads:

“The court instructs you that it is the duty of a director in a trust company to ascertain the value of its assets and the amount and extent of its liabilities; and the law presumes that a director is familiar with the surplus and profits and the intrinsic value of the assets and the amount of the liabilities of any trust company of which he is a director, and the law presumes in this case that these four defendants were all familiar with the assets and liabilities, the past earnings, surplus and profits of the Bankers Trust Company.”

There is no error in this instruction. The statutes of this State (Sections 1131 and 1133, R. S. 1909) fix the duties of the directors of trust companies in this

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State. The performance of those duties so prescribed by these statutes, forces the directors to know the exact *status* of their company. The law presumes that such directors performed their duties, and would likewise presume that they possessed the knowledge which would come to them from the performance of such duties, and in this case Franklin, the president and one of the directors, says he was on the "inside" and did know. Construing Section 1099, Revised Statutes 1909, of the Banking Law, which is similar to Section 1131, *supra*, of the Trust Company Act, this court said it was the duty of the directors to know the express provisions of the statutes defining their duties and powers. [Lyons v. Corder, 253 Mo. l. c. 558, et seq.]

And in *Bank v. Hill*, 148 Mo. l. c. 389, it is said: "The board of directors of a bank have a general superintendence over and the management of all its business affairs and transactions which ordinarily vest with it; and it has been said that 'they are bound to know all that is done, beyond the merest matter of daily routine; and that they are bound to know the system and rule arranged for its doing.' [Morse on Banks and Banking (3 Ed.) sec. 116.] And what they ought to know as to the general course of the bank's business, they will be presumed to have known, in a contest between the bank and third persons dealing in good faith with it."

But even if this is not the rule, the defendant in this case says he was on the "inside" and did know, and the instruction would be harmless, with this admission of knowledge.

Complaint is also made as to the use of the phrase "intrinsic value of the assets." This clause counsel says should not have been used without being defined to the jury. The words "intrinsic" and "value" are both plain English words of ordinary use. Certainly a jury would not be befogged by the use of the word "value" nor do we think that condition would arise by the addition of the qualifying term "intrinsic."

V. Complaint is also made of the instructions, 7, 8, 9, 10, 11 and 22, given for the plaintiff. These are, as follows:

Duty of Directors. "7. The court instructs you that in determining whether the defendants, or any of them, knew the real value of the stock of the Bankers Trust Company in 1913, you may consider the fact that they were then and had for some time prior thereto been members of its board of directors, and as such had full opportunity to learn its financial condition and the value of its assets, and the extent of its liabilities; and that as directors of the Trust Company it was the duty of each and everyone of the defendants to examine its books and to learn its financial condition and the value of its assets, and the amount of its liabilities.

Purchase by Stockholder. "8. The court instructs you that even though plaintiff was in the office of the Bankers Trust Company and was a stockholder before he purchased the last 45 shares of stock, and as such stockholder he had the legal right to examine the books and accounts of the Bankers Trust Company for himself, yet he had a right to rely upon the statements and representations made to him by the officers and directors of the Bankers Trust Company on or prior to June 1, 1913, if you find that any were so made, without examination, and he was not bound to examine the books for himself before purchasing said stock.

Printed Circulars. "9. The court instructs you that if you find from the evidence that printed statements of the financial condition of the Bankers Trust Company were issued and circulated in pamphlet or card form with the knowledge and consent of the board of directors for the purpose of thereby inducing people to purchase stock in said Trust Company, then the directors are liable for false representations, if any, contained in such printed statements to the same extent that they would be if the statements therein contained had been made by them directly to such purchaser.

Assumption of Fact. "10. The court instructs you that if you find that false statements were knowingly made to plaintiff by defendants, or any one of them, for the purpose of inducing him to purchase stock of the Bankers Trust Company, it is not necessary for you to find that such false statements of any one of the defendants was the cause of plaintiff's purchasing stock in order to enable you to return a verdict against defendant, but it is sufficient to render a defendant liable that such false statements were one of the causes which substantially contributed to induce plaintiff to purchase stock.

Representation of Fact. "11. The court instructs you that positive statements in reference to the past or present earnings of a corporation, by its directors, or officers, or statements as to the value or soundness of its assets, or the amount of its liabilities, or the present value of the stock, or as to the sale of any of its assets, are all statements of fact upon which a prospective purchaser has a right to rely and they are not mere expressions of opinion.

Damages. "22. The court instructs the jury that the measure of damages recoverable in an action for deceit in inducing the purchase of shares of stock in a corporation, is the difference between the value it would have had if defendant's representations about it had been true and the real value of said shares at the time of their purchase, and the jury may ascertain such value in the light of the subsequent events in the history of the company; and all the facts in evidence relating to the assets, the history and condition of the company may be considered by you on the question of damages for the purpose of determining the actual value of the stock at the time of the purchase; and if you find a verdict in favor of plaintiff you should allow him as damages an amount equal to the difference between the actual value of the stock at the time of purchase, and the value the stock purchased in reliance on the false representations,

if any, of defendants, would have had at that time of the false representations, if any, made to plaintiff by defendants on or prior to June 1, 1913, representing the said stock had been true, less the \$6,000 of dividends plaintiff has received on said stock, and you should then add interest on the remainder, if any, from the date of purchase to the present time; and this total will be your verdict."

We see no error in Instructions 7, 8, 9, 10, and 11, supra. They declare sound law in deceit cases. Counsel rely upon *Bank v. Hutton*, 224 Mo. l. c. 70 et seq., but they overlook the fact that the corporation there in question was not a bank or trust company, and that the statutes governing these two classes of corporations make it the duty of the directors to know the condition of their corporation. And in addition Franklin says in his letter that he was on the inside and did know. The foregoing applies to Instruction 7.

As to Instruction 8 it is urged that inasmuch as plaintiff was a stockholder, and a man of experience, when he bought the last 45 shares, he had the right to look at the books, and should not have relied upon the statements of the directors whose duty it was to know the condition of his corporation. The evidence shows that plaintiff had confidence in Franklin, and this Instruction 8 was not error.

So, too, Instruction 9 is a fair statement of the law. The objection is that some of these circular statements were after June 1, 1913, and therefore after the purchase of the first 500 shares of stock. However, they were before the purchase of the last 45 shares, and the instruction was proper.

The objection to Instruction 10 is that it "assumes defendants made false statements and assumes that plaintiff was thereby induced to purchase." The face of the instruction dispels the idea of "assumption." In the very first line, it says "if you find," which left the matter to the jury. The objection to Instruction 11 is just as frivolous.

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VI. Instruction number 22 is, as will be seen, the instruction on the measure of damages. No complaint is made that the instruction states the wrong measure of damages. The instruction states the correct measure of damages. Counsel urge that the instruction assumes that defendants made representations and that they were false. This objection is not tenable from a glance at the instruction.

Next it is urged that it is erroneous in that the jury are allowed to ascertain the value of the stock "in the light of subsequent events in the history of the company." We have ruled in a previous paragraph that evidence of this character was admissible as tending to show the value of the stock at the date of purchase, and if the evidence was proper, the court was not in error in telling the jury that it could be considered in determining value. The other two objections to this instruction are just as meritless.

VII. Lastly it is urged that there was error in refusing to give Instructions E and F for defendant, which read:

"E. You are further instructed that you must disregard the testimony given by plaintiff, Morrow, to the effect that defendants told him that the Bankers Trust Company could continue indefinitely to pay

Opinions:
Refusal to
Withdraw. a four per cent quarterly dividend, that if plaintiff bought stock in the company he could sell it in six months time at a profit or advance price, that the stock was going to increase in value, that the stock would be worth \$300 per share by January, 1914, and other statements in his testimony as to the future value of the stock or future earnings of the company. Such assurances, even if they were given, do not in law give plaintiff any right to recover in this case, both because they are not alleged in plaintiff's petition and because they were mere opinions or predications as to what would occur in the future; and you are, therefore, instructed not to give the testimony above referred to any consideration in arriving at your verdict.

“F. Plaintiff alleges in his petition that defendants stated and represented to him that the Bankers Trust Company could be liquidated in twelve months and the sum of \$200 a share paid to the stockholders. Such a statement or representation, even if made, was a mere matter of opinion, and is no ground in law for a suit for damages; and you must, therefore, give no consideration to the testimony which the plaintiff, Morrow, gave in support of the above allegation.”

The refusal of these instructions was not error. All such statements were made in connection with the representations as to the value of the stock, and the condition of the company, and its assets, and were made to bolster up the representations as to value and conditions, and were a part and parcel of the representations as to value and conditions. They were parts of the conversations, and whilst if they stood alone they might be mere expressions of opinions, and would not be actionable, but in the connection in which they were used, it was not error to refuse to withdraw them. Especially is this true in view of the fact that the court had previously told the jury what statements were statements of fact and not expressions of opinions. *Vide* instruction eleven, *supra*.

But in addition to this the court had explicitly told the jury in Instruction No. 6 just what representations would authorize a recovery, and no mention was made of these opinions as to what would happen in the future. To say the most the refusal of these two instructions was mere harmless error.

The record, as between plaintiff and the defendant Franklin, presents sharp issues of fact. This was not true as to the defendants dismissed from the case. The findings of the jury upon these disputed issues of fact, are binding here. This is a law case, and the findings of the jury bind, if supported by substantial evidence. The weight of the evidence is not a matter for consideration here. The trial courts alone weigh the evidence for the determination of its

Weight of
Evidence.

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weight. Such is the province of trial courts, but not of this court. If the trial court permits the findings of a jury to stand, this court only examines the record to see whether or not there is substantial evidence in support of the findings. In this case the trial court performed the duty placed by the law upon it. Such court weighed the evidence, and found that there was no sufficient evidence to sustain the findings as against Parker and other defendants, but that the findings of the jury were sustained by the evidence as to defendant Franklin. Our review of the evidence convinces us that there is substantial evidence to sustain the verdict as against Franklin, and this is as far as this court can go. We will not array the evidence upon one side as against the evidence upon the other, and determine which preponderates. We have no such duty in a law case. The judgment is affirmed. All concur, except *Elder, J.*, not sitting.

C. M. SMITH BROTHERS LAND & INVESTMENT
COMPANY, Appellant, v. MARTHA C. PHILLIPS
et al.

Division One, July 23, 1921.

1. **HOMESTEAD: Greater Than Dower: Conveyance: Re-marriage: Assignment.** Where the homestead was worth less than the statutory value and was all the land in which the widow was entitled to dower and she conveyed her "life interest" therein, her grantee became clothed with all her interest in the homestead, and of her alternate right to dower when she re-married, and of her right to quarantine until dower is assigned; and upon her re-marriage and the consequent extinguishment of her homestead, her rights of dower and quarantine remained unaffected, and her grantee may have dower assigned to him; but her homestead became extinguished upon her re-marriage, and the special statute of limitations began to run from that date, and her grantee must bring suit for the recovery of her dower within ten years or be barred.
2. —: **Duration as to Minors: Re-marriage of Widow.** Under the Homestead Act of 1895 the homestead estate of minor children is limited to the joint right of occupancy with the widow, and at her death or re-marriage it passes to them by descent as if no homestead law existed.

3. ———: ———: ———: **Limitations.** The right of the widow to dower being assignable, and her homestead right being extinguished by her re-marriage, and the right to have dower assigned reviving upon the extinguishment of her homestead right, and the homestead estate of the minor children being limited to the joint right of occupancy with the widow, they are in possession after her re-marriage by right of inheritance from their father and not under the Homestead Act, and it is upon the date of her re-marriage that the right accrues to her or her assignee to have her dower admeasured and assigned, and the grantee in her deed, made after her husband's death and before her re-marriage, must bring his suit to have assigned and to recover her dower within ten years after her re-marriage, under the statute (Sec. 391, R. S. 1909) which declares that "all actions for the recovery of dower in real estate, which shall not be commenced within ten years after the death of the husband, through or under whom such dower is claimed or demanded, shall be forever barred."
4. ———: **Assignment of Dower: Limitations.** Where the homestead is all the real estate of which the husband died seized and does not exceed the statutory value or quantity, it is unnecessary to appoint commissioners to assign dower to his widow; but her deed conveys her dower and her re-marriage extinguishes her homestead right, and the right of her grantee to have her dower admeasured to him accrues on the date of her re-marriage, and becomes extinct in ten years thereafter.
5. ———: ———: ———: **Quarantine: Limitations.** The widow's quarantine, which is her right to remain in and enjoy the mansion house and the messuages and plantation thereto belonging, is an incident to the right to have dower assigned, and when that right ceases quarantine also ceases, and where her grantee is barred by limitations to recover her dower he is also barred to recover any supposed quarantine right.

Appeal from Mississippi Circuit Court.—*Hon. Frank Kelly*, Judge.

AFFIRMED.

R. L. Ward and Russell & Joslyn for plaintiffs.

(1) Immediately upon the death of James J. Phillips on the 24th day of November, 1895, the land in controversy, which did not exceed in value the sum of fifteen hundred dollars, passed to and vested in his widow, Martha C. Phillips, and his children, Ollie, Florence, James, Thomas Milas, and Jessie, who was yet unborn,

and continued for their benefit until the youngest child attained its legal majority, and until the death of said widow, with the joint right of occupation until the children attained their majority and until the death or remarriage of the widow. Laws 1895, p. 186. (2) Under said law, the probate court having jurisdiction of the estate of the deceased housekeeper, was required, when necessary, to appoint three commissioners to set out such homestead to the person or persons entitled thereto. The commissioners appointed to set out such homestead were required, in cases where the right of dower existed, to set off such dower, but they were required first to set out the homestead, and if the interest of the widow in such homestead equal or exceed a one-third interest for and during her natural life in and to all of the real estate of which such housekeeper or head of the family shall have died seized, no dower could be assigned to such widow. The land in controversy being all which the deceased housekeeper owned at the time of his death, the widow's life estate or interest in the homestead was more than her dower. R. S. 1889; sec. 5440. (3) On the death of her husband, Martha C. Phillips became invested with three cognate rights in and to the premises: quarantine, dower and homestead. *Phillips v. Presson*, 172 Mo. 27. (4) The right of quarantine is a possessory right on which an action of ejectment may be maintained; is assignable and carries with it all the incidents which belong to it prior to the transfer. *Stokes v. McAllister*, 2 Mo. 163; *Jones v. Manley*, 58 Mo. 559; *State v. Moore*, 61 Mo. 276; *Brown v. Moore*, 74 Mo. 633; *Gentry v. Gentry*, 122 Mo. 202; *Fisher v. Siekman*, 125 Mo. 165; *Carey v. West*, 139 Mo. 146; *Phillips v. Presson*, 172 Mo. 27; R. S. 1889, sec. 4514; R. S. 1919, sec. 316; *Young v. Thrasher*, 115 Mo. 222. (5) The remarriage of Martha C. Phillips on the 8th day of August, 1903, did not extinguish her dower and quarantine rights. *Chrisman v. Linderman*, 202 Mo. 605; *Westmeyer v. Gallenkamp*, 154 Mo. 28. (6) Neither Martha C. Phillips nor her subsequent grantees could hold possession

under the quarantine statute nor have dower assigned, or set-off as a separate entity from the homestead. *Phillips v. Presson*, 172 Mo. 27; *Chrisman v. Linderman*, 202 Mo. 621. (7) The homestead statute and the dower statute are not antagonistic to each other, but must be construed together. No provision in either should perish by construction, unless there is no reasonable escape from such construction. *Chrisman v. Linderman*, 202 Mo. 621. (8) The Smiths, plaintiff's grantors, commenced their action on the 4th day of October, 1899, to assert their rights under the quarantine law when they filed their answer in the ejectment suit instituted by Martha C. Phillips, on behalf of her minor children, to recover possession of the premises in controversy. This was the commencement of an action for the recovery of dower or any interest therein with the meaning of Sec. 391, R. S. 1909, *Phillips v. Presson*, 172 Mo. 24. (9) Dower in the land in controversy and all the rights incident thereto were covered up or merged, as it were, in the homestead, and could not be enforced by any action known to the law until after the expiration of the homestead estate. *Chrisman v. Linderman*, 202 Mo. 621. (10) The defendants, Martha C. Phillips and Thomas Milas Phillips, were estopped from pleading the ten-year Statute of Limitations after they instituted their suit in ejectment and recovered possession of the premises in controversy. *McFarland v. McFarland*, 211 S. W. 23. (11) The right of Martha C. Phillips to have her deed to the Smith brothers set aside on the ground of fraud was barred by the Statute of Limitations long prior to the date of the institution of this suit. R. S. 1919, sec. 1305; *Turnmeyer v. Claybrook*, 204 S. W. 178.

Haw & Brown for defendants.

(1) In so far as the replies of appellant to the separate answers of respondents apply to the plea that plaintiff's cause of action is barred, said replies merely deny "each and every allegation, averment and statement of new matter" in said answers contained. Such

denials amount to nothing more than a confession of the matter alleged in the answer and do not present any issues to be decided. R. S. 1919, secs. 1232, 1235, 1237 and 1256; *Holt v. Hanley*, 245 Mo. 359; *Dezell v. Fidelity & Casualty Co.*, 176 Mo. 253, 279; *Boles v. Bennington*, 136 Mo. 522; *Young v. Schofield*, 132 Mo. 650, 661; *Snyder v. Free*, 114 Mo. 360, 367; *Brickell v. Williams*, 180 Mo. App. 572; *Betz v. Telephone Co.*, 121 Mo. App. 473. (2) The right of dower is older than that of homestead, the latter being strictly of American origin while the origin of the former is of such antiquity that it is involved in much doubt and obscurity. 21 Cyc. 459, note 5; 19 C. J. 458, sec. 4 and 5. Dower is an institution of the State; is held sacred and has been strongly fortified against invasion; is a legal, and equitable, and a moral right favored in a high degree by law. Courts are vigilant and astute in preserving dower, and it was therefore subject to award in 1903 when the widow lost her homestead by marriage. 19 C. J. 400, sec. 10; *Jordan v. Rudluff*, 264 Mo. 129; *Donaldson v. Donaldson*, 249 Mo. 228, 245; *Holt v. Hanley*, 245 Mo. 352, 361; *Chrisman v. Linderman*, 202 Mo. 605, 613-622. Even when the interest of the widow in the homestead is greater than dower, the latter is not extinguished by, nor merged in homestead; but, while the widow is entitled to both, the right to have dower assigned and to enjoy it separate from the homestead does not exist. As soon, however, as homestead is lost by marriage there arises a reason for having dower assigned, and the right to do so reappears—"suspended during widowhood it revives again in re-marriage." *Jordan v. Rudluff*, 264 Mo. 129, 137; *Chrisman v. Linderman*, 202 Mo. 605, 619-624. The right, therefore, to have dower assigned in this case, revived, at the latest, when the widow of J. J. Phillips married William Taylor, in 1903, and as the petition in this cause was not filed until August 16, 1917, the action is barred by the dower Statute of Limitations. R. S. 1919, sec. 359; R. S. 1889, sec. 4558; *Edmonds v. Scharff*, 213 S. W. 823; *McFar-*

land v. McFarland, 211 S. W. 23; Belfast Inv. Co. v. Curry, 264 Mo. 483, 494. (3) While the authorities cited by appellant in its brief do seem to hold that ejectment may be maintained to recover possession of the mansion house, etc., under the right of quarantine, yet none of the cases cited considered the provisions of the dower statutes in reaching that conclusion. Until the assignment of dower the widow has no right under her claim of dower to enter and occupy any portion of her husband's estate unless such right is given by statute. At common law the right of quarantine was the right to remain in the mansion house for forty days after the husband's death during which time dower was to be assigned to her. 19 C. J. pp. 531 and 532, sec. 205. Statutes changing the common law are not to be understood as affecting any change in the law beyond that which is expressed or necessarily implied from the language used. 36 Cyc. 1145 (b). By the dower statutes in force at the time of the death of J. J. Phillips the Legislature seems to have intended to extend the time during which the widow might enjoy the mansion house and messuages thereto belonging to two years and to require that at the end of that time, if not before, her dower should be assigned and set-off. R. S. 1889, secs. 4533, 4534, 4536-4542. (4) Appellant did not plead estoppel and cannot, therefore, avail itself thereof. Taylor v. Edmonston, 210 Mo. 411, 428; Golden v. Tyer, 180 Mo. 196, 204; Casler v. Gray, 159 Mo. 588, 595. This case contains none of the elements of estoppel. Gentry v. Gentry, 122 Mo. 202, 221. It is the policy of the law to guard against estoppels, because estoppels may exclude the truth. Osburn v. Court of Honor, 152 Mo. App. 652, 661.

BROWN, C.—Ejectment to recover eighty acres of land in Mississippi County described as the east half of the northwest quarter of Section Nine, Township Twenty-five of Range Fifteen. The defendants are Martha C. Phillips and Thomas Milas Phillips. The common source of title is James J. Phillips, who died in-

testate, seized of the land, while occupying it as his home with his family, consisting of the defendant Martha C., his wife, and five minor children, of whom her co-defendant is one. Another child was born shortly after his death. The plaintiff claims through a deed dated April 8, 1898, and recorded the next day, whereby Mrs. Phillips conveyed what she designated as her life interest in the land in controversy, together with an undivided one-eleventh interest in two hundred additional acres, to James E. Smith, William R. Smith and Charles M. Smith, the organizers and stockholders of the plaintiff corporation, to which they afterward conveyed it. The consideration named in this deed was \$2,000. It is admitted that the land in controversy was not worth more than \$1,500 at the time of the death of James J. Phillips.

The defendants filed separate answers, both denying generally the allegations of the petition, and pleading the general Statutes of Limitations of ten years. Thomas Milas also pleaded the special Statute of Limitations of ten years with reference to proceedings for the recovery of dower. Martha C. denied this, and pleaded that the deed of April 8, 1898, under which plaintiff claims, was obtained from her by fraud on the part of the grantees, and asked that it be cancelled and set aside. The new matter in both answers was denied by replication. Reply to the answer of Martha C. also pleaded the Statute of Limitations to the equitable relief asked by her.

The defendant Martha C. Phillips was married to one Taylor August 8, 1903. They continued to live together as husband and wife until April 5 1907, when she obtained a divorce from him. Jessie, the youngest child of James J. and Martha C. Phillips, was the last to reach her majority, which occurred in 1914.

The three Smith brothers entered upon the land under their deed from Martha, and the plaintiff corporation, under its deed from them, continued in possession. On August 21, 1899, Martha C., the widow, being duly qualified as guardian of her children, brought ejectment in their name against the Smith Brothers and one Pres-

son, their tenant, and recovered judgment therein, which was affirmed by this court. [Phillips v. Presson, 172 Mo. 241.] She immediately entered with her children under the judgment, and she and her son and co-defendant Thomas Milas Phillips have remained on the land ever since.

No dower has ever been admeasured or assigned to Mrs. Phillips or to any person representing her dower estate; nor has any proceeding been had to set off the homestead to the widow or children, unless that was the effect of the ejectment determined in this court in 1902.

On August 24, 1899, Mrs. Phillips brought suit in equity to cancel her deed to the Smith Brothers, which was dismissed at the following October term.

The judgment was for the defendants on the ejectment issue, from which the plaintiff has prosecuted this appeal. The court also, by the same judgment, found the issue tendered by the cross petition of Mrs. Phillips for the plaintiff, and refused the equitable relief asked, from which she has appealed.

These appeals have been separately docketed and argued in this court and are therefore separately considered.

I. The only question arising upon this appeal is whether by the deed of Mrs. Phillips to the Smith brothers, dated August 8, 1898, and their deed to the plaintiff corporation, the latter had, on August 16, 1917, the date of the beginning of this action, any possessory interest in the land, which it might recover thereby. The converse of the same proposition is whether, but for that conveyance, Mrs. Phillips, the grantor, would now have any possessory interest in the land recoverable in any form of action she might bring.

The land was the homestead of her deceased husband. In 1895 she and her six children were, by his death, left on the land, and it was then their family homestead. By virtue of this statute a freehold estate to the whole immediately vested in her under the Home-

stead Act of 1895 (R. S. 1899, sec. 3620) subject to be defeated by her re-marriage, and also subject to the "joint right of occupation" by the children during their minority. This being the only land of which he died seized, and not exceeding in value the sum of fifteen hundred dollars, the homestead estate vested in herself and children included all the dower to which she could in any possible event be entitled unless she should re-marry. In that event her interest in the homestead would cease by the terms of the act which created it.

The appellant's sole claim of title is founded upon the deed from the widow made in April, 1898, purporting to convey her life interest. We will assume that through this deed it became clothed with all her interest in the homestead, and her alternative right of dower should she re-marry, and also, in that event, her right to quarantine until dower should be admeasured and assigned to her. [Chrisman v. Linderman, 202 Mo. 605.] This deed gave, so far as she was concerned, an immediate possessory right jointly with her children, and immediately upon its execution the grantees made an arrangement with her by which she not only vacated the homestead herself, but took her children with her to a farm in New Madrid County owned by the grantees, who entered upon the homestead themselves, and remained in exclusive possession thereof by themselves, their grantee the plaintiff corporation, and its tenant until ousted by the children in pursuance of the judgment of this court in Phillips v. Presson, 172 Mo. 24. It thus happened that on August 8, 1903, while the minor children were, by their mother duly qualified as their guardian, in possession, the homestead title was extinguished by the marriage of Mrs. Phillips. The question thus presented is whether this plaintiff, upon the title acquired through the deed of Mrs. Phillips to the Smith brothers, being out of possession, are now entitled to recover the possession of the land or any interest therein in this suit. It does not claim the homestead interest vested in Mrs. Phillips by the death of her husband, but plants itself upon the proposition that by her re-marriage in 1903 she would, but for her

conveyance to the Smith brothers, have become seized of the right to have dower assigned to her and that this right was vested in plaintiff through her deed. That the right of the widow to dower is assignable by deed after the death of the husband is the settled law of this State. [Chrisman v. Linderman, *supra*; Jordan v. Rudluff, 264 Mo. 129.]

In these cases it was held, in substance, that notwithstanding the fact that by the provisions of the Homestead Act of 1895 the widow might forfeit her homestead by re-marriage, her rights of quarantine and dower remained unaffected by the intervention of the homestead estate. In the Jordan Case we held that the assignment of the homestead under the Act of 1895 "carried with it the primary right of possession, so that if the homestead exceeded in extent the amount of land to which she would be entitled as dower in the absence of a homestead right, nothing was left to be assigned as dower unless and until a subsequent marriage should divest her homestead estate with its right to the possession of the whole" (p. 137). In that case the heirs had, after the death of the husband and before the re-marriage of the widow, brought a suit in partition to which she was made a party, and in which the homestead was assigned to her to an extent greater than the amount to which, upon her subsequent re-marriage, she was entitled as dower. After her re-marriage the heirs, who were children and grandchildren of the deceased husband, entered upon the homestead, deforcing her, as she alleged, of her dower, and the action then before us was instituted to recover it out of the land included in the homestead and to have damages for the deforcement. In sustaining her right to the remedy, we also held that as a party to the partition she had been entitled to have her interest ascertained and declared by the court the same as would any other party to the proceeding having a contingent interest that might at sometime develop into a possessory right, and her homestead having been already set out in the partition suit and adjudicated to be greater in extent than her dower she was entitled by statute to recover it when de-

forced by the wrongful entry of the heirs upon the entire homestead tract. The case involved a more or less critical examination of these statutes and we find no reason to modify the rule we then applied, and therefore re-affirm it in so far as it may have any application to the facts of this case. Although this suit is ejection for the recovery of the homestead, which includes all the lands of which the husband and ancestor died seized and out of which any dower might be demanded, we will, for the purpose of getting to the merits of the real controversy, treat it as involving the right of the plaintiff, as assignee of the "life interest" of the widow, to have her dower in any form of action available to it for that purpose. For that reason we will refer to some features of our statutes relating to homestead and dower which were not necessarily involved in the questions before us in the Jordan Case.

II. The law relating to the transmission of the homestead of a deceased housekeeper or head of a family for a long time previous to 1895 was embodied in Section 5439, Revised Statutes 1889, as follows:

"If any such housekeeper or head of a family shall die, leaving a widow or any minor children, his homestead to the value aforesaid shall pass to and vest in such widow or children, or if there be both, to such widow and children, and shall continue for their benefit without being subject to the payment of the debts of the deceased, unless legally charged thereon in his lifetime, until the youngest child shall attain its legal majority, and until the death of such widow; and such homestead shall, upon the death of such housekeeper or head of a family, be limited to that period."

Statute
of 1889.

The most striking feature of this section lies in its indefiniteness as to the estate of the children of an intestate homesteader succeeding the death of the widow who naturally becomes the head of the family by his death. In the absence of statutory provisions on that subject the children, irrespective of their age, would take the entire

inheritable estate upon the death of their ancestor, subject to the widow's dower, which would be extinguished by her death. Should the statute be so construed as to preserve the entire homestead estate to the last minor until he should attain his majority and the widow should die during his minority, his guardian would constitute the head of the family of which he would be the sole member. It is unnecessary to demonstrate the complications which might arise in the application of such rule, otherwise than to note that it attracted the attention of

the General Assembly, which in 1895 amended the section by defining the nature and duration of the estate of the minor children by the addition of the following clause which we italicise to suit our purpose: "that is to say, the children shall have the *joint* right of occupation *with the widow* until they shall arrive respectively at their majority, and the widow shall have the right to occupy such homestead during her life or widowhood, and upon *her* death or re-marriage it shall pass to the *heirs of the husband*."

This amendment was not an inadvertence, but exhibits a deliberate purpose, in well chosen words, to limit the estate of minor children to the joint right of occupation with the widow who has become the natural head of the family, and at her death or re-marriage to pass it by descent as if no homestead law existed.

By the operation of this amendment the homestead estate was extinguished by the remarriage of the widow in 1903 and the six children, or their assigns, were clothed with the entire estate of their ancestor, subject to the dower estate of his erstwhile widow held by plaintiff through the conveyance from her to the Smith brothers, whose right, as well as the right of the plaintiff corporation, is only co-extensive with hers. The question is whether the plaintiff in that capacity may maintain a suit for the recovery of her dower in the premises, notwithstanding the provisions of Section 391, Revised Statutes 1909, which was in force at the time of the death of the owner, which is the event upon which the claims of

both parties is founded. The section last cited is as follows: "All actions for the recovery of dower in real estate, which shall not be commenced within ten years from the death of the husband through or under whom such dower is claimed or demanded, shall be forever barred."

III. In the recent case of *McFarland v. McFarland*, 278 Mo. 1, l. c. 12, we said that this statute "exhibits the intention to limit the quarantine of the widow to ten years and such further time as is necessary to perfect the judicial assignment of her dower, and also to put an end to the uncertainty which hangs over every title in which a deed appears which does not contain a release of dower." This evident intention affords valuable aid in its application to the facts of each particular case involving its application. Since its enactment in 1887, legislative changes have been made affecting the recovery of dower which present questions not within the contemplation of the Legislature at that time, and it may become the duty of the court to determine whether they come within the reason or the enactment and call for its remedial application.

The section quoted requires actions for the recovery of dower to be commenced within ten years *after the death of the husband under whom it is claimed*. After its enactment, and in 1895, another act was passed by which the widow who remarried after the death of the husband under whom she claimed and enjoyed a homestead forfeited it, and was remitted to her action for dower in the same premises. This leads us necessarily to inquire as to the effect, if any, of the special limitation imposed by the Act of 1887 as finally incorporated, with amendment, in Section 4558, Revised Statutes 1889, upon the recovery of dower by the widow in such a case.

In *Investment Co. v. Curry*, 264 Mo. 483, this court held directly that Section 4558 of the Revision of 1889 repealed all the saving provisions of the Act of 1887 by dropping them from the revised act, so that the disability of coverture was no longer an excuse for the failure

of the doweress to commence her action for the recovery of her dower within ten years from the death of her husband as required by said Section 4558. That case simply held that the disabilities enumerated in the general statute of limitation did not apply to the special limitation imposed by this section upon actions for the recovery of dower.

In *Jordan v. Rudluff*, *supra*, reported in the same volume, we held with equal distinctness that the possession of the homestead by the widow and minor children under the provisions of the Act of 1895, was equivalent to the enjoyment by the widow of her dower in the lands of her husband where the homestead exceeded in extent the dower to which she would have been entitled but for the existence of the homestead right. This decision proceeded upon the principle that upon the extinguishment of the homestead by the marriage of the widow her right arose to have her dower in all the lands assigned out of the lands which she had theretofore possessed by her right of homestead, the entire homestead, subject to her dower, having descended to the heirs under the provisions of the Act of 1895. It was upon *her* death or remarriage that the act devolved the title upon the heirs of the husband. [Laws 1895, p. 186.] The entire title and possession became as if no homestead law had ever existed. It consisted of the right of dower consummate in the widow, and the estate of inheritance cast upon the children by the death of their father.

This subject was before us in *McFarland v. McFarland*, *supra*. In that case the widow upon the death of the husband made an arrangement with the heirs by which the lands of the deceased husband were to be held and managed for the benefit of all, she receiving one-third of the value of the rents and profits annually. This arrangement was carried out for ten years, at the end of which the heirs refused to recognize her right under the agreement by paying her the agreed share of the rentals. We held that the heirs were estopped from

repudiating the agreement for the purpose of availing themselves of this same special statute of limitations, and that for that purpose the arrangement amounted to a voluntary assignment of dower under which the widow had enjoyed her statutory right, and that the repudiation of the agreement constituted such defeasement of her dower as entitled her to bring her action, notwithstanding that more than ten years had elapsed since the death of the husband through whom she claimed it.

We hold upon the authority of these cases construing the Act of 1895 from which we have quoted, that the homestead created and vested in the widow and minor children of the deceased Phillips ceased as to all of them upon the re-marriage of the widow; that thereupon and thereafter the children were in possession by right of inheritance from their father and not under the Homestead Act, and that the right then accrued to the widow or her assignee to sue for and have her dower in the same lands admeasured and assigned to her. It only remains to determine whether the plaintiff as such assignee has lost this right by lapse of time under the provisions of this or any other statute of limitations of this State.

IV. Section 5439, Revised Statutes 1889, from which we have already quoted, provides that the probate court should, when necessary, appoint three commissioners to set out the homestead of the deceased householder or head of a family, and the next section required that the commissioners should first set out the homestead and from the residue of the real estate of the deceased set out the dower, which should be diminished by the value of the interest of the widow in the homestead, and that if such interest should equal or exceed her dower no dower should be assigned to the widow. The homestead being all the real estate of which Mr. Phillips died seized, and it being admitted that it did not exceed in value fifteen hundred dollars, it was

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of Dower.**

unnecessary to appoint commissioners, and no dower was assigned. The homestead having been extinguished by her remarriage on the 8th day of August, 1903, her right to dower from the same lands then accrued against the heirs, whose title by inheritance had become complete subject to such dower, to plaintiff through the widow's deed to the Smith brothers dated April 8, 1898. This suit was instituted on August 18, 1917, more than fourteen years after the homestead title of the widow and minor children became extinct, and twenty-odd years after the death of the husband.

V. In this State the right of quarantine depends upon the provisions of Section 4533, Revised Statutes 1889, which provides that "until dower be assigned, the widow may remain in and enjoy the mansion house of her husband, and the messuages or plantation thereto belonging, without being liable to pay any rent for the same." This is an incident to the right to have dower assigned and when that right ceases the right to quarantine also disappears. Were it otherwise the failure of the doweress to institute a proceeding for the recovery of her dower within the time limited would have the effect to give her the right of possession of the mansion house and messuages or plantation thereto belonging in perpetuity. The question is whether the right to sue for dower is barred by the Statute of Limitation of ten years, and of that there can be no doubt.

It follows that the judgment of the Circuit Court for Mississippi County denying the plaintiff the relief asked in its petition is right, and it is therefore affirmed. *Ragland* and *Small, CC.*, concur.

PER CURIAM:—The foregoing opinion of BROWN, C., is adopted as the opinion of the court. All of the judges concur; *James T. Blair; J.*, in the result.

C. M. SMITH BROTHERS LAND & INVESTMENT
COMPANY v. MARTHA C. PHILLIPS and THOM-
AS MILAS PHILLIPS, Appellants.

Division One, July 23, 1921.

1. **DOWER: Homestead: Re-marriage: Limitations.** Where the widow conveyed her interest in the homestead property and then married again, her right to dower accrued on her re-marriage, and the right of her grantee to maintain suit to have assigned and to recover dower is barred in ten years after her re-marriage, and said grantee being barred her right to have her deed cancelled as fraudulent and to have dower assigned to her is likewise barred in ten years.
2. ———: ———: ———: **Ejectment: Equitable Defense.** The widow conveyed her "life interest" in the homestead property, and then re-married, and more than ten years thereafter her grantee brought ejectment to have dower assigned and admeasured and to recover the same. To this action she, being in possession and all the householder's children having reached their majority, filed a cross-bill, alleging that her deed, made nineteen years prior thereto, was void for fraud perpetrated upon her by the grantee, and asking that said deed be cancelled, and claiming that she was entitled to exclusive possession by virtue of her statutory quarantine. *Held*, that the court having adjudged that the action of her grantee to recover dower was barred by limitations, and that judgment being affirmed on appeal, that holding put the plaintiff out of the case, and it likewise settled the entire controversy, for the only use she could then make of a judgment annulling her deed would be to aid her in procuring an assignment of dower as against the children of her husband, and the pleadings make no such issue between her and them.

BROWN, C.—Two appeals were taken in this case and separately docketed for hearing in this court. The first of these, *ante* page 579, was taken by plaintiff, who sued in ejectment, from a judgment denying it the relief asked, and this is an appeal by the defendant Martha C. Phillips from the judgment dismissing a cross petition filed by her asking equitable relief against the plaintiff.

It asked no relief against her co-defendant, Thomas Milas Phillips, and no issue between the two defendants was presented by the pleadings.

We have held in a separate opinion considering the matters involved in the plaintiff's appeal, that it had no cause of action and affirmed the judgment of the circuit court to that effect, and will not reconsider any matter so determined in passing upon the single question presented by this appeal, namely, the right of the appellant to the affirmative relief sought by her in her cross petition. In all other respects the holdings of the court as expressed in that opinion are equally conclusive as to all the parties to these appeals.

The suit is plain ejectment, and the petition is in the conventional form, charging both defendants alike with possession of the premises. At the trial plaintiff claimed through a conveyance executed by this appellant April 8, 1898, to the Smith brothers, its predecessors in title, conveying her "life interest" in the eighty acres of land in question as the widow of James J. Phillips, who died intestate in 1895 while domiciled upon the land with his wife and their minor children. The appellant having remarried August 8, 1903, and no dower having been assigned, the plaintiff claimed all right to the possession which appellant, but for her conveyance, would have had as doweress by virtue of her statutory quarantine, and not otherwise. We held, in considering the plaintiff's appeal, that more than ten years having elapsed after the death of appellant's husband and her remarriage on August 8, 1903, and the institution of this suit, the plaintiff was barred of recovery upon that title by the terms of the special Statute of Limitations relating to the recovery of dower.

This holding put the plaintiff out of the case. It was founded upon the theory that appellant's conveyance was valid and sufficient to transfer all her interest as doweress which might spring from her subsequent remarriage, and that those interests had become forfeited by its inaction.

The appellant, by her cross action now under consideration, undertakes to present a theory not involved in the plaintiff's appeal. She asserts, with much force and detail, that her conveyance to Smith brothers through whom plaintiff claims, was void for fraud perpetrated upon her by the grantees in its procurement, and that she, having been in possession adverse to plaintiff's claim through her deed, was not barred by the Statute of Limitations from presenting it as a defense when that possession should be attacked. In other words she contends, as we understand, that the deed being void for fraud she was not bound to act upon the presumption that the holders intended to enforce it, but might rest upon the assurance of their honest recognition, by inaction, of her right. Without questioning the general rule that matters barred by the Statute of Limitation as ground of recovery may nevertheless be used as weapons of defense in proper cases, we will consider it with reference to the facts before us.

When appellant made the deed to Smith brothers in 1898 she occupied the land with her six minor children as the homestead left her by her deceased husband. She immediately surrendered its possession to Smith brothers, the purchasers, and moved with her children to a farm which they provided for her occupation. On August 21, 1899, after qualifying as guardian of her children, she brought suit in ejectment in their name against the tenant of Smith brothers to recover possession of the homestead, and on the 24th of the same month she sued Smith brothers in equity to set aside her deed to them for fraud. The last-mentioned suit was dismissed by her at the first term, while the ejectment suit was prosecuted to final judgment, which was affirmed by this court on February 18, 1903 (*Phillips v. Presson*, 172 Mo. 24), and she took possession under the judgment for her children, the youngest of whom attained her majority about the beginning of the year 1914.

The fact that she instituted the ejectment suit for her children without joining herself as a plaintiff can only be explained as a clear admission that her right to possession with them under the Homestead Act had passed by her deed to the Smith brothers. Her suit to cancel that deed, instituted three days afterward, although indicating a disposition to reinstate herself in her homestead right for the same fraud which she now pleads, her prompt dismissal of that suit indicates a deliberate purpose to abandon the position that her deed was invalid for fraud perpetrated upon her by the grantees, and stand upon the right of her children alone. Her final recovery in the Presson Case was in right of her children alone, and we find nothing in this record indicating that she changed her position in that respect by denial of the validity of her deed to Smith brothers or otherwise, until the filing of her amended answer in this suit, or that she had asked or received from her children, the inheritors of the fee, any assignment of, compensation for, or other recognition of her dower. She is as clearly barred of her action therefor under the special limitation of ten years as was the plaintiff claiming through Smith brothers, her grantees.

The plaintiff being out of the case, the only use this appellant could make of her cross bill would be to aid her in procuring an assignment of her dower as against her co-defendant, Thomas Milas Phillips. She asks no remedy against him, and the pleadings make no issue whatever between them. She only asks a useless judgment against the plaintiff.

The subject-matter of this suit being confined to the title of the parties to the particular tract of land in suit, the plaintiff having been defeated by the judgment of the circuit court to the effect that it has no possessory right whatever in or to the premises, and no issue being raised by the pleadings as between the defendants, we can see no reason why that judgment does not settle the entire controversy.

The nineteen-year-old cause of action presented by the cross petition of this appellant having been unnecessary to her complete defense she was not prejudiced by the general finding of the court against her on the issue so presented. Although it appears that the deed involved in this part of the controversy purported to convey some interest in other lands, such lands were in no way involved in this suit, nor are they described in the pleadings. No claim is made that the grantees in the deed and their successors, if any, have not been in undisturbed possession of such lands from the date of its execution in 1898.

The judgment seems to afford appellant all the relief to which she is entitled upon the pleadings, and we see no reason for disturbing it to let in a new trial in her favor which, so far as her appeal shows, cannot add to the relief already granted her.

The finding and judgment of the circuit court upon her cross petition is therefore affirmed. *Ragland* and *Small, CC.*, concur.

PER CURIAM:—The foregoing opinion of BROWN, C., is adopted as the opinion of the court. All of the judges concur.

R. N. ALEXANDER, Appellant. v. ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY.

Division One, July 23, 1921.

1. **NEGLIGENCE: Contributory: Railroad Crossing.** The driver of an automobile, traveling on a public street twelve miles an hour towards a railroad, who, had he looked at any time after he reached a point within fifty feet of the crossing, could have seen a train approached, but did not look, was guilty of contributory negligence.

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2. ———: ———: ———: **Looking in Wrong Direction.** Near the railroad track were some bill boards and trees which obstructed a southward view of the railroad track of a traveler on an intersecting public street, until he had passed them and was within fifty feet of the track, and from there on there was nothing to prevent him seeing an approaching train except the telegraph poles, which were about one hundred and seventy-five feet apart, which to a man traveling in an automobile, the traveler testified, would obstruct a view of a passenger train of six cars for a half mile; after passing the bill boards, which were eighty feet from the track, he did not look southward until his automobile, traveling twelve miles an hour, was within ten or fifteen feet of the track; when he was twenty-seven feet from it he could have seen a train coming from the south for a distance of a half mile, but he did not see or hear the train until he was within ten or fifteen feet of the track, which was then too close to stop his automobile before the long train, an hour behind schedule and running from twenty-five to thirty-five miles an hour, would have reached the crossing, and his only chance therefore was to go ahead, but in trying to cross he was struck and injured. The reason he did not look southward for an approaching train after passing the bill boards was that a gentleman riding with him called his attention to some one who was standing north of the street near the track and was hallooing to him, apparently, and this attracted his attention northward and before he ceased to look in that direction his automobile had run sixty-five or seventy feet, which brought him within twelve or fifteen feet of the track. He was intimately familiar with the crossings and obstructions. There was no evidence that, after his peril had been discovered or could have been known by the fireman or engineer, the train could have been stopped in time to have avoided injuring him. *Held*, that, whether the bell was rung and the whistle sounded or not, and whether or not the train was running in excess of ordinance speed, he was guilty of such contributory negligence as bars recovery of damages, and the humanitarian rule has no application to the case.
3. ———: ———: **Ordinance Rate: Violation As Excuse: Reliance Upon Observance.** Contributory negligence is not abrogated or excused by the violation of an ordinance limiting the rate of speed a train may be run within the corporate limits of a city, nor does such violation relieve a traveler on a public street of the city to look and listen for such train as he approaches a crossing; nor where the traveler is guilty of contributory negligence in not looking, when to have looked would have been to have seen the train in time to avoid injury, has he a right to go to the jury on the theory that he might have crossed the track in safety had the train been ob-

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serving the ordinance. But said rule does not abrogate the other rule that the traveler who knows of the existence of the ordinance may rely upon its observance, if he does not know it is being violated.

4. ———: ———: **Humanitarian Rule: Inability to Stop Train.** Where the evidence is undisputed that the train, if it had been running at the maximum ordinance speed of twelve mile an hour, could not have been stopped in time to have avoided injuring a traveler at the railroad crossing, after his peril was discovered or discoverable, and the traveler was guilty of contributory negligence in not looking for the train, when to have looked would have been to have seen it in time to have avoided the accident by the exercise of proper care, there is no room in the case for an application of the last-chance or humanitarian rule.
5. ———: ———: ———: **Obstruction by Telegraph Poles.** Testimony that a driver of an automobile cannot see a train of six coaches a half mile distant at any point within eighty feet of the track on account of telegraph poles located one hundred and seventy-five feet apart along the edge of the right of way is so unreasonable and against all common observation and experience as to be devoid of probative force.

Appeal from Jasper Circuit Court.—*Hon. Grant Emerson*, Judge.

AFFIRMED.

J. D. Harris for appellant.

(1) The court committed reversible error in directing a verdict for the defendant at the close of the plaintiff's case. The plaintiff's proof abundantly showed that the defendant was negligent in running its train at a speed not only in violation of the ordinance, but at a speed that would be dangerous at such a crossing within the city limits in the absence of an ordinance; that the defendant's servants failed to give warning or signal of the approach of the train by ringing the bell or sounding the whistle. (2) The engineer admits that his fireman by the most casual watch could have observed the plaintiff after he passed out from behind the bill-board,

a distance of eighty feet from the track, and that no alarm was sounded and no effort made to bring the train to a stop or even slacken its speed, until the moment of impact, when he started to set his brakes. The plaintiff's proof shows conclusively that his automobile was traveling at a rate of speed not to exceed twelve miles per hour. The engineer says that he was running better than twenty-five miles per hour, but that if he had been going at the ordinance rate of twelve miles, and his fireman had warned him of plaintiff's approaching the track, with the appliances at hand, he could have slackened the speed of the train to six miles an hour by the time it reached the crossing. With these facts conceded and abundantly proved in this record, there can be no two views in this case, but that if the train had been running at the ordinance speed, the plaintiff would have passed across the track and passed beyond the zone of danger before the engine would have reached the crossing. In approaching the crossing he had the right to indulge the presumption that if a train should be approaching the crossing it would be running in compliance with the ordinance fixing the speed. He had the right to indulge the presumption that if a train were approaching the crossing the bell would be rung, because the crossing was within the corporate limits of the city. In indulging these presumptions he was merely proceeding in the course of a man of reasonable prudence and according to the course of the law, without forfeiting his rights for damages resulting from the defendant's negligence. The plaintiff was not guilty of contributory negligence as a matter of law. The question of the plaintiff's contributory negligence was one for the jury. This position is abundantly sustained by the adjudicated cases of this State. *Monroe v. Chicago & Alton Railroad Co.*, 219 S. W. 68; *Maginnis v. Railroad*, 268 Mo. 667; *Lagarce v. Railroad*, 183 Mo. App. 85; *Jackson v. Railroad*, 189 S. W. 381; *Stotler v. Railroad*, 200 Mo. 107; *Weigman v. Railroad*, 223 Mo. 699; *Underwood v. Railroad*, 190 Mo. App. 417; *Donohue v.*

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Railroad, 91 Mo. 357. (3) Under the statute it is the imperative duty of railroads to have the engine equipped with a bell and to keep the same ringing continuously for 80 rods before reaching the crossing. They do not have, in cities, the alternate of ringing the bell or sounding the whistle, the bell must be rung and continuously, in order to comply with the statute. *Mitchel v. Railroad*, 122 Mo. App. 50; *Donohue v. Railroad*, 91 Mo. 357. (4) Contributory negligence to prevent a recovery cannot be imputed to a person because he did not look for the train when his view in the direction it was approaching was obstructed by a row of houses or other obstructing objects. *Donohue v. Railroad*, 91 Mo. 357; *Weigman v. Railroad*, 223 Mo. 699; *Mitchel v. Railroad*, 122 Mo. App. 50. (5) Where the defendant's servants and agents in charge of its train, before the injury, discovered, or by the exercise of ordinary care might have discovered the plaintiff's position of peril, although caused by their concurring negligence, and neglected to use the means at their command to prevent the injury, the defense of contributory negligence is not available. The violation of a municipal ordinance, which regulates the speed of trains, is negligence *per se*, and every person traveling in a public street in a city has a right to presume that the railroad will obey such ordinances, he has a right to rely upon the fact that no train would be run by the railroad at a greater rate of speed than that fixed by the ordinance. It is as much the duty of the railroad's servants to look out for him on the track, or approaching the track, as it is his duty to look out for a train approaching such crossing. *Kellney v. Mo. Pac. Ry. Co.*, 101 Mo. 67, 77.

W. F. Evans, Howard Gray, Allen McReynolds and Mann & Mann for respondent.

(1) The evidence shows conclusively a clear case of contributory negligence on the part of the appellant, in

that after he had passed the obstruction of the billboard on his right, had he looked he could have seen the approaching train in ample time to have stopped his car and avoided his injury. He is, therefore, precluded from recovery, and the trial court was right in so instructing the jury. *McCreery v. Railway*, 221 Mo. 31; *Sanguinette v. Railroad*, 196 Mo. 466; *Hayden v. Railroad*, 124 Mo. 566; *Kelsay v. Railroad*, 129 Mo. 362; *Huggart v. Railroad*, 134 Mo. 679; *Kries v. Railroad*, 148 Mo. 330; *Underwood v. West*, 187 S. W. 84; *Green v. Railroad*, 192 Mo. 131; *Mockwick v. Railroad*, 196 Mo. 550; *Tannehill v. Railway Co.*, 213 S. W. 818. (2) Mere looking and listening do not suffice. The traveler must exercise care also to make the act of looking effective. He must not approach the track at such a rate of speed that when he reaches the point where he could see the approaching train it is too late to protect himself. 3 *Elliott on Railroads*, secs. 1164, 1165, 1166; 2 *Sherman & Redfield on Negligence*, secs. 476, 478; *Greer v. Harvey*, 195 Mo. App. 11, *Hook v. Railway*, 162 Mo. 585; *Dey v. Railway*, 140 Mo. App. 473. (3) The obligation to look is a continuing one and is not discharged when one takes a look at a place from where he cannot see. If there is another position from which he can get a view of the track for his own protection he must avail himself of it. This the plaintiff did not do. *Kelsay v. Railway*, 129 Mo. 372; *McCreery v. Railway*, 221 Mo. 31; *Walker v. Railway*, 193 Mo. 481; *Sanguinette v. Railroad*, 196 Mo. 494; *Tannehill v. Railroad*, 213 S. W. 818. (4) The rule of contributory negligence is not abrogated by an ordinance limiting a rate of speed, and the fact that respondent's train was running in excess of the ordinance limit did not relieve the appellant of the duty to look and listen for his own protection, nor entitle him to go to the jury on the theory that he might have crossed safely if the train had been observing the ordinance limit of speed. *Weller v. Railroad*, 120 Mo. 635; *Turner Railroad*, 74 Mo. 602; *Burge v. Ry.*, 244 Mo. 76; *Stottler*

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v. Ry., 204 Mo. 639; Hunt v. Ry., 262 Mo. 275; Moore v. Ry., 176 Mo. 544; Laun v. Railroad, 216 Mo. 579; Green v. Ry., 192 Mo. 131; Schmidt v. Railroad, 191 Mo. 215.

(5) Neither can the last chance doctrine be invoked to aid appellant's case. There is no testimony showing the train could have been stopped in time to have averted the collision. The absence of such showing is fatal to appellant on this proposition. Burnett v. Railway, 172 Mo. App. 51; Hamilton v. Railroad, 250 Mo. 722; Sites v. Knott, 197 Mo. 684. (6) Besides, with the train going twenty-five miles an hour and the automobile ten or twelve miles, after the automobile reached the side track only four seconds would elapse until the collision. Too short a space of time in which to evoke the last chance rule. McGee v. Railroad, 214 Mo. 530, 542; Degonia v. Railroad, 224 Mo. 596; Burge v. Railroad, 244 Mo. 102. (7) Appellant cannot evade the consequences of his contributory negligence or excuse his negligent failure to see the approaching train by the attempt in his brief to invoke the presumption that he relied upon the train observing the ordinance as to the rate of speed. He was on the witness stand and testified, but he failed to state that he relied upon such presumption. He testified that he was looking and listening for the train; that he was in this instance, as he had always been, vigilant. He thereby raised the conclusive presumption that he was not relying upon the train being restricted to the ordinance limit of speed. Mockowik v. Railroad, 196 Mo. 571; Reno v. Railroad, 180 Mo. 483; Nixon v. Railroad, 141 Mo. 439; Bragg v. Railroad, 192 Mo. 321. Neither could he in any circumstances raise the presumption that although he might have actually seen the train approaching, he could have assumed that the engineer was obeying the law; and proceeded on his way on that presumption, because he testified that when he did see the train he could tell that it was coming thirty miles an hour and his witness who had just passed over the track and saw it coming and was in the same relative position

to it, testified that it was coming thirty miles an hour. What this witness saw, he could have seen, and what he testified himself to having seen rebuts any presumption. *Green v. Mo. Pac. Ry. Co.*, 192 Mo. 131; *Laun v. Railroad*, 216 Mo. 563. Neither can he be heard to say that where there were no obstructions to his view he looked and did not see, or that it was useless to look because he could not have seen. *Knorpp v. Wagoner*, 195 Mo. 664; *Dean v. Transit Co.*, 192 Mo. 485; *Latson v. Transit Co.*, 192 Mo. 466.

WOODSON, P. J.—This suit was instituted in the Circuit Court of Jasper County by the plaintiff against the defendant to recover the sum of \$25,000 for personal injuries sustained by him through the alleged negligence of the defendant, in running one of its trains of cars against him in the city of Carthage, Missouri.

The trial resulted in the plaintiff taking an involuntary nonsuit with leave to move to set same aside, which motion was overruled, and he duly appealed the cause to this court.

Counsel for the respective parties have made rather an exhaustive statement of the facts of the case, but we substantially adopt that of the appellant for the reason that it presents a clearer and stronger view of plaintiff's case than his own statement does, also presents in a fuller and clearer manner the defendant's case than does that of the plaintiff.

As no question is presented involving the sufficiency of the pleadings they will be put aside, and we shall deal only with the facts as shown by the record, and the law as declared by the court.

The facts are:

Central Avenue runs east and west, and appellant was going east. The railroad runs from the southeast to the northwest, but more nearly north and south. The train with passenger equipment of seven coaches and the

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engine, with an average length of something like seventy-five feet, was approaching the crossing from the south, or southeast, and running to the north, or northwest.

The accident occurred on the 26th day of October, 1917, at seven o'clock a. m. The train was one hour late.

The appellant testified in his own behalf that the crossing in question was a much traveled one; that he had lived in Carthage twenty-six years, during all of which time he had been familiar with the crossing and the surroundings; that he had served two terms as a member of the city council, and that at the time of the accident, he was, and for eighteen months prior thereto, had been street commissioner of the city of Carthage. In other words, the testimony admits his entire familiarity and intimate knowledge of the situation at the crossing, as far as the obstruction either to his right or left was concerned, as he approached the place of the accident.

The ordinance limiting the speed to twelve miles an hour was introduced and appellant testified to his knowledge of its existence. He did not testify, however, that he relied upon the presumption that the train would be restricted in its operation to the ordinance speed as it approached the crossing. On the contrary, he says he saw the train and when he saw it it was running not less than thirty miles an hour according to his best judgment at the time.

He testified that as he approached the crossing the speed of his automobile, of which he was the driver, and which contained on the seat with him one passenger, Mr. Hull, was going not less than ten and not over twelve miles an hour, slightly down hill to the track; that his automobile and the brakes thereon were in good condition; that going at that speed he could stop his automobile in fifteen or twenty feet; that he doesn't think he was ever able to stop it in less than a rod going ten or twelve miles an hour. That if he had been going four or five miles an hour he could have stopped his car at ten or

twelve feet; that as he approached the crossing there was quite a tier of billboards that set just off of the street just outside of the sidewalk, some eight feet high and perhaps forty feet long, and that west of that, before you came to the billboards, were houses and buildings and so on; that after you got to the billboards there was considerable brush, limbs of trees, that obstructed the view until you got more than half way from the billboards to the railroad; that the thorn tree which he spoke of was about thirty feet from the south line of the street, and about something like thirty feet east of the billboards; that the body of the tree was right in line with the right of way of the railroad; right in the fence there was a black thorn tree about four or five inches in thickness, twenty or twenty-five feet high, with considerable top to it, beside a good deal of other brush that was along the fence; and the hang-over limbs from trees outside of the railway fence obstructed the view almost entirely until you got from behind the tree; that the tree wasn't close enough to the billboard to obstruct the view, but the trees along the fence hung down to such an extent you could not see up the railroad to any extent until you got past the black thorn tree; that from the thorn tree to the track wouldn't be over twenty-five feet.

That as he approached the track the view to the north was practically unobstructed; that he was at the wheel of his car on the north side thereof; that he was watching for the train; that he was always careful about that as he approached railroad crossings; that as he got somewhat past the billboards referred to, while the trees mentioned were in the way to the south, Mr. Hull, who sat beside him, asked: "Is that fellow hollooming at us," and that he (appellant) looked immediately to the north, the direction in which Hull was looking, and there were a number of railroad men there, not less than one-hundred feet from the street; that he didn't have time to find out who they were calling; that he saw no motion by the men; that he had hardly time to look, running thirty or forty feet, until

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Hull said, "Look out;" that he turned his head the other way and there was a train just off the street not more than fifty or one-hundred feet away, coming down the track toward him; that the front wheel of his car had just crossed the side track, and he was so close to the main track that there was no chance for him to stop without stopping on the track, and no chance to turn either way; that he saw instantly what his only chance was, and the only safety he had was to try to get across the track, and that was the last he knew.

The testimony by the witnesses show that he was struck on the crossing by the train, inflicting the injuries for which he sues.

He testified that he heard no signal, by either the bell or whistle. Other witnesses corroborate him in this respect, but the engineer, whom appellant put on the stand, testified that the fireman was sitting on the seat ringing the bell at the time of the accident, and had been since the time it arrived in the corporate limits; in addition, that it had whistled for the crossing signal.

He testified on direct examination also that the railroad track running southeast is almost entirely straight for a full half mile and is considerably down grade, and a train coming down it generally coasts; that there is no grinding of the wheels and no noise made by the train to amount to anything; that at the time he discovered the train the front wheels of his automobile were about twelve feet from the crossing.

After testifying to the extent of his injuries, he was cross-examined. That he was entirely familiar with the situation of Central Avenue crossing; that he had hauled gravel from the pit over it ever since he had been commissioner, off and on; and had been familiar with the crossing and surroundings for twenty-six years; that on October 26th the leaves had fallen a little; that there was nothing to the north to obstruct his view of a train approaching from that direction; that there were two

tracks to the railroad where it crossed Central Avenue; that the first track which he approached was the switch track and that he knew that that morning; that he had given his deposition in May, 1918, after the accident on the 26th of October, 1917. (The trial was on the 20th day of November, 1919). That when he had given his deposition he had testified in answer to questions by Judge Gray:

"Q. Do you know how far west of the main track of the Frisco an automobile would be when you could see up the track a quarter of a mile? A. No, I don't know, but it would be guess work with me. I should think about eighty or ninety feet.

"Q. Eighty or ninety feet west of the main track, you had a view of the main track, of a train coming from the south, about a quarter of a mile? A. Yes, sir.

"Q. When you get to the west line of the right of way what would obstruct it? A. There wouldn't be anything.

"Q. When you were about eighty feet from the crossing Mr. Hull said, 'Do you think those men are hollooming to us'? A. Yes, that was his remark.

"Q. Then from that time on until you got over the switch track or about over the switch track, Mr. Hull said nothing to you about the approaching train? A. Not until just as we were running on the switch.

"Q. Then, Mr. Alexander, had Mr. Hull looked to the south any time, he not being concerned with the operation of the machine, from the time those men holloomed until you ran onto that switch, this train coming would have been in plain view? A. Yes."

As to this last question and answer the witness on the stand said he didn't think he answered it as transcribed, but he couldn't say as to how he answered it.

He was then asked regarding his deposition; if the following question and answer given by him at the time were not correct:

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"Q. Tell me, how you could have looked between the time you got within eighty feet of that track and the time you got over the switch, without seeing the train? A. I had been looking and listening for a train, and my attention was turned the other way on account of his remark and their hollooming, and I was approaching the track, it takes very little bit, running twelve miles an hour to run eighty feet. I had run perhaps sixty-five or seventy feet during the time."

He said he thought he had answered that way.

He was asked if the following question was not propounded to him in the deposition:

"Q. Now, Mr. Alexander, you said you were looking and listening—when did you look to the south after you got within eighty feet of the track, and when you could have seen the train coming? Had you looked before the time you looked and it was too late? A. I hadn't looked at all."

And he replied that this was correct.

Then he stated again on the stand at the trial that as a matter of fact he hadn't looked to the south, after he got to the end of the billboard eighty feet from the track until his front wheels were across the switch, which he thinks was about twelve feet from the main track, though he had never measured it, and doesn't know whether it was sixteen feet or not; that he had stepped the distance from the main line track to the corner of the billboard, and that it was eighty feet; that he had done this after his deposition was taken.

He admitted that at the taking of his deposition he was asked: "Q. When was it you were looking to the south and listening for a train, and where were you with respect to the billboard on the west side of the track and on the south side of Central Avenue?"

And that he had answered: "A. I was mighty near the point where I should have seen the train; my attention was attracted the other way."

He testified that, if there were no other obstructions when he passed the billboard and got in eighty feet of the track, as far as the billboard was concerned when you get past it you could see up the railroad to the Harrington Quarry, which the testimony shows was several blocks away.

He reiterated he was eighty feet from the main line when Hull spoke to him. He again reiterated that he never looked south after he passed the billboard until he was within twelve feet of the crossing, and that after he had crossed past the billboard if he had looked down the track south he could have seen a train one hundred and fifty feet, and every foot nearer the track it traveled would have enabled him to see farther up the track if he had been looking that way, and then when he was twenty-seven feet from the west rail of the main track that he could have seen a train south for half a mile, except in so far as the telegraph poles would obstruct his view; that the telegraph poles to a man in an automobile would obstruct a train containing six coaches half a mile away.

After other witnesses had testified, the plaintiff was recalled to the stand by his counsel for a further examination, and he testified on direct examination that when he was going down Central Avenue he was looking and watching for trains more from the south than the north, because he had a better view to the north than to the south; that he saw no signal, heard no whistle, heard no noise or any train whatever; that he had been looking and listening more to the south than to the north, although he always watched both ways, and he was asked this question by his counsel:

“Q. How long a time elapsed when your attention was called by Hull of that fellow calling to you, how long an interval of time elapsed when you turned your head in that direction to look, and when you turned it back again on the second statement of Hull’s? A. I couldn’t say, I shouldn’t think more than two or three seconds.”

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Then on cross-examination he was asked, "If he had looked up the track south when fifty feet from the main track, if he could not have seen down past the light plant?" Answer, "Well, there would have been some obstruction in the way; it is hard to see a train or anything of that kind, in an automobile when it is moving;" and that if he had been stopped, his view would have been practically unobstructed, except by the poles; that after he passed the billboard everything else was off the right of way, except the poles.

After he had complained about his view being obstructed by the poles he was asked: "Q. You think the seven-car train would be cut off from your view by telephone poles 173 feet apart?" His answer was, "To a great extent in an automobile."

Dr. Webster testified to the extent of plaintiff's injuries, which testimony is immaterial here.

P. S. Vance testified that he, driving a wagon, had crossed this crossing just a head of the appellant and after passing over the crossing noticed the approaching train coming toward him, at a rate of speed, in his judgment, at thirty or thirty-five miles an hour. His cross-examination shows that he had reached a certain point after observing the train when he heard the collision, which was almost one-third of the distance that the train was from the crossing when he saw it approaching (his team going about four miles an hour).

He also testified that the obstruction of the thicket up there on that knoll prevented you seeing the train coming down the track until you would be almost on the track.

On cross-examination he testified that the knoll in question was away up at Third Street two blocks away. Other witnesses testified as to the extent of plaintiff's injury, and that the speed of the train was twenty-five or thirty miles an hour.

J. W. Meredith was the only other witness except the engineer who testified as to the view of the appellant as he approached the track. He said that according to his remembrance there was quite a board fence that ran pretty close, he couldn't say how close, and some brush and things along down there next to the road and some trees that had grown up there.

"Q. State whether or not this obstructed the view there at that time. A. Well, yes, to some extent of course."

On cross-examination he said that on account thereof the view wasn't exactly plain for a person going down; that the trees were in the right-of-way fence.

There were no photographs introduced in evidence, but they were used in the examination of the witnesses, and the testimony of the witnesses show that they admit that they showed an unobstructed view after the billboard was passed.

Appellant introduced Price Parmlee, in charge of the locomotive that struck his car, as a witness. He testified that the train consisted of engine, tender, six or seven passenger coaches; that they were an hour behind time and running twenty-five miles an hour; that the whistle was blown for the crossing signal at the Missouri Pacific crossing, and that the bell was rung the entire time after entering the corporate limits until the collision; that the automobile came onto the crossing from the fireman's side; that he, the engineer, did not see or know anything of it until his attention was called to the fact by the fireman, which was just before the crossing was reached, right against it, and that he immediately commenced setting the brakes; that there was a heavy train of seven cars; it had already whistled for the station, and that the application of his brakes as they approached the Missouri Pacific crossing had more or less exhausted his air.

Plaintiff's attorney on re-direct examination drew from this witness the statement that if he had been running twelve miles an hour he could not have stopped sooner than half the train length, the length of three cars at the least calculation; that twelve miles an hour would take less space within which to stop than twenty-five; that his fireman was sitting on the seat box ringing the bell and looking ahead, and that watching he could see the automobile as soon as it came out from behind the billboard; and that if he had been notified of the approach of the automobile as soon as that occurred, and he was within one hundred feet of the crossing, he could have applied the brakes and slackened the train some by the time he got to the crossing, a little bit, if he had seen it, but not down to five or six miles an hour; perhaps he could have slowed down to six miles an hour; that you can't apply the brakes in a second, that it takes a little space to get into communication with the fireman after he discovers it.

He testified that if the fireman had known when the man was eighty feet away that he wasn't looking, wasn't going to take care of himself, he, the engineer, could not have received notice and applied the air and stopped the train before reaching the crossing.

After the engineer's testimony, appellant called O. C. Donehay as an expert witness. He testified that the average length of a passenger coach was seventy-five or eighty feet, some of them longer. This expert testified that the engineer, after the fireman told him of the approach of the automobile, could, in his judgment, have stopped the train in two train lengths, which would have been a pretty good stop at twenty-five miles an hour; and that if he had been going at twelve miles an hour under the same conditions, could have stopped the train within five hundred or six hundred feet.

I. The first contention of counsel for appellant is that the trial court erred in declaring as a matter of law that he was guilty of such contributory negligence as to prevent his recovery in this case. In support of this contention we are cited to the following cases: *Monroe v. Chicago & Alton Railroad Co.*, 219 S. W. 68; *Magninis v. Railroad*, 268 Mo. 667; *Lagarce v. Railroad*, 183 Mo. App. 70, l. c. 85; *Jackson v. S. W. Mo. Ry. Co.*, 189 S. W. 381; *Stotler v. Railroad*, 200 Mo. 107; *Weigman v. Railroad*, 223 Mo. 699; *Underwood v. Railroad*, 190 Mo. App. 407, l. c. 417; *Donohue v. St. L., I. M. & S. Railroad Co.*, 91 Mo. 357.

The appellant testified that there were no signals given of the approach of the train that struck him, and he was corroborated in that statement by other witnesses; he also stated that he was perfectly familiar with the crossing where he was injured, and the conditions and surroundings there, and had been for many years.

He also described a certain billboard and a locust tree and some brush which obstructed his view of the train until after he passed the east end of the billboard, which was eighty feet from the main track, and that after reaching that end, the tree and the brush mentioned still partially obstructed his view of the train until he reached a point about fifty feet from the track, and from there on there was nothing to obstruct his view except the telegraph poles, which were something like one hundred and seventy feet apart; that after passing the east end of the billboard he did not look south again until he ran his automobile some sixty-five or seventy feet, which brought him within ten or fifteen feet of the main line track. When he was twenty-seven feet west of the rail of the main track, he could have seen the train coming from the south for a distance of a half a mile, except in so far as the telegraph poles would obstruct his view; that the telegraph poles to a man in an automobile

would obstruct a train containing six coaches for a distance of half a mile. He was driving his automobile at twelve miles an hour and could stop it in twelve or fifteen feet. He never saw nor heard the train until he was within ten or twelve feet of the main track, which was too close to stop his car before the train would have reached the crossing, so he then tried to cross the track in front of the approaching train and was struck by it and injured. The reason why he did not look south for the train after passing the end of the billboard was that Mr. Hull, the gentleman riding with him, called his attention to someone calling to him, who was north of the track, which attracted his attention in that direction and before he got through looking in that direction his automobile had run some sixty-five or seventy feet, which brought him within twelve or fifteen feet of the crossing.

Under the authorities cited counsel for appellant contend that the evidence mentioned made a case for the jury, and that the court erred in declaring as a matter of law that he was guilty of contributory negligence, and was not entitled to a recovery.

We shall briefly consider those cases:

In *Monroe v. Chicago & Alton Ry. Co.*, *supra*, the plaintiff, as he approached the crossing in his automobile, actually looked towards the approaching train at a time when he could see and did see enough of the track in the direction of its approach, and saw that there was no train on it, and that it was impossible for a train to come within his view running at the ordinary speed limit and to strike him before he could have cleared the track; from that point to the crossing his view was completely obstructed. The court in that case properly held that the plaintiff made a case, but no such facts appear in this case; the appellant never looked, and had he looked at any time after he reached a point within fifty feet of the crossing he could have seen the approaching train.

Maginnis v. Mo. Pac. Ry. Co., supra, was decided upon the humanitarian doctrine. In that case the evidence shows that the engineer was looking directly at the deceased when he was sixty feet from the crossing, and could see that he was oblivious to his danger, but gave him no warning whatever. It was true *Maginnis* was guilty of contributory negligence which barred his right to a recovery, but for the fact that the engineer had the last clear chance to save his life after observing his negligence and peril, but negligently failed to avail himself of that chance. This record presents no such case as that.

The same facts were involved in the case of *Lagarce v. Mo. Pac. Ry. Co.*, supra, as were those in the *Monroe Case*, supra. In that case plaintiff had the last clear view of the track when he was forty feet away. He saw enough of the track to show that train approaching at a lawful rate of speed could not reach the crossing until he had ample time to get over it. That is not true in this case.

Nor is the case of *Jackson v. S. W. Mo. Ry. Co.*, 189 S. W. 381, in point. In that case Jackson was approaching the crossing at right angles, and when in about fifty feet of it he got his first possible view of the approaching car, which was some one hundred and fifty feet away, which was the limit of his vision. Jackson and the motorman exerted themselves to the utmost to stop and avoid the collision, but neither was able to do so. No signal of the approaching car was given. It was held that Jackson could not as a matter of law be guilty of contributory negligence, because both he and the motorman testified that after he got the first possible view of the approaching car he tried to avert the collision. In the case at bar the appellant could have seen the approaching train, for a distance of half a mile or more, had he looked in that direction after he reached the end of the billboard, and especially when he was about fifty feet from the crossing. Nor is the case of *Stotler v. Railroad Co.* in point. In that case the defendant was operating its train in excess

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of the speed limit, which was eight miles an hour, but in discussing that case the court, on page 146, said:

"Now if this case be viewed from the standpoint of plaintiff's evidence, she is presumed to have looked and listened and to have seen and heard the train. If it be viewed from the standpoint of defendant's evidence, she actually did see the train when it was forty rods away and she was still in a place of safety south of the track. The case then has progressed to the point where fault can be found with the plaintiff, if at all, not in her not looking and listening, in her not seeing and hearing the advancing train, but in the act of driving on the track immediately before the train. The act in question was not hers, but if she actually participated in that act or is responsible therefor she ought not recover."

The court then proceeded to show the tender age of the plaintiff, her reliance upon her mother who was the driver, and on that theory alone held that she was not guilty of contributory negligence as a matter of law. And it may be inferred from the opinion in the Stotler case that the mother, who was driving the vehicle, would have been barred as a matter of law by her contributory negligence.

In *Weigman v. St. L. Iron Mt. & Southern Ry. Co.*, the plaintiff was held not guilty of contributory negligence, as a matter of law, because there was an engine and train of cars on the side track which prevented him from seeing the approaching train until his horses' feet were on the track, the train having given no signal of its approach.

The *Underwood Case* is similar to the *Weigman Case*, and was disposed of upon the same principle. That case quotes from the *Campbell Case* the following language:

"In this case the boy had a right to expect that there would be headlight (signals) on any car on that road, and if he looked in both directions as he approached the track and saw no headlight (heard no signals), and if he then concluded for that reason that there was no car

coming and drove on the track, the court had no right to say, as a matter of law, that he was guilty of contributory negligence."

The trouble with the case at bar is that the appellant testified that he never looked in the direction of the approaching train after the billboard was passed until he reached a point some twelve or fifteen feet from the crossing.

The case of *Donohue v. St. L. Iron Mt. Ry. Co.*, 91 Mo. 357, is analogous to the last considered case. Touching the right of the appellant to rely upon the presumption that respondent was limiting the speed of the train to that prescribed by the ordinance, the case of *Kellney v. Mo. Pac. Ry. Co.*, 101 Mo. 67, cites the *Donohue Case* and holds that:

"If Kellney had been in a position where by looking he could have seen the approaching train and could have seen that it was running in excess of ordinance speed and at such a rate that if he went on the track he would be struck before he could get off he could not recover."

In the case at bar Alexander admits and his other witnesses testify to the rate of speed, and as we have heretofore said there is no presumption left in the case on that proposition.

In the consideration of this case counsel for the appellant seems to assume contributory negligence is abrogated or excused by the existence of an ordinance limiting the rate of speed a train may run in a city, where the train has violated the ordinance, and that in consequence thereof the appellant was relieved of all duty to look and listen for its approach and was therefore entitled to go to the jury upon the theory that he might have crossed the tracks in safety had the train been observing the ordinance.

That is not the law of this State. He was still chargeable with contributory negligence, in the same degree as if no such ordinance was in existence. (Of course I do not mean to convey the idea that if such an ordinance exists, and a person knows of its existence, he may

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not rely upon its observance, if he does not know that it is being violated). The following cases are authority for the legal proposition before stated: *Weller v. Railroad*, 120 Mo. 635; *Turner v. Railroad*, 74 Mo. 602; *Burge v. Railway*, 244 Mo. 76; *Stottler v. Railway*, 204 Mo. 619, 639; *Hunt v. Railway*, 262 Mo. 271, 275; *Moore v. Railway*, 176 Mo. l. c. 544; *Laun v. Railroad*, 216 Mo. 563, 578; *Green v. Railway*, 192 Mo. 131; *Schmidt v. Railroad*, 191 Mo. 215.

· II. It is not seriously contended by counsel for appellant that he was not guilty of contributory negligence, but seeks to escape the effects thereof by invoking the last chance doctrine.

He put the engineer on the stand who testified that he could not have stopped going at the rate of speed he was traveling in time to have averted the accident. He then proves by the engineer that if he had been going at the ordinance limit, twelve miles an hour, he could not have stopped in time to have averted the accident. He proves by the engineer, who was on the opposite side from appellant as he approached the track, that after he became aware that he was not going to stop in the clear, as any one seeing him would have every right to presume he would do, he did all he could to stop in time, and failed to do so.

There was no evidence introduced tending to contradict the testimony of the engineer, or that the train could have been stopped in time to have averted the injury after the appellant was in apparent place of danger.

It is true that appellant, in a kind of off-hand way, stated that a man in an automobile could not see a train of cars within a distance of half a mile approaching the crossing in question from the south, at any point east of the end of the billboard mentioned and west of the crossing, on account of the telegraph poles, which were one hundred and seventy-five feet apart, which would be about fifteen poles, set in the usual and ordinary way.

This testimony is so unreasonable and against all common observation and experience, we deem it unworthy of further notice. There is no probative force in it whatever, and the trial court probably refused to submit it to the jury upon the ground that it was against the physical facts in the case.

For the reasons stated we are of the opinion that the trial court properly declared as a matter of law that the appellant was guilty of contributory negligence and that he could not recover.

Finding no error in the record the judgment is affirmed. All concur.

CARRIE WALDMANN, Appellant, v. SKRAINKA
CONSTRUCTION COMPANY.

Division One, July 23, 1921.

1. **NEGLIGENCE: Contributory: Instructions: Demurrer.** If the defendant was not guilty of negligence, or if its negligence was not the proximate cause of plaintiff's injury, or if the plaintiff herself was guilty of contributory negligence as a matter of law, she has no cause to submit to the jury, and, defendant having asked a demurrer to the evidence, which was refused, no error in the instructions need be considered on appeal, for in such situation there could be no reversible error in any instructions given or refused for either party.
2. ———: ———: **Excavation in Street: Known to Plaintiff.** While a traveler on a public street or sidewalk may ordinarily presume that the way is clear and in good condition, he cannot, if he knows that the same is torn up or obstructed by public work being done thereon, go forward in reliance upon the presumption that the way is clear, but must exercise his faculties to see and discover the dangers he may encounter from such obstruction, and if he fails to do so and is injured thereby he is guilty of contributory negligence and cannot recover damages, although the public authorities or the contractor doing the work may also have been negligent in regard to such obstruction.

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3. ———: ———: ———: ———: **Ordinary Care.** In reducing the surface of an alley to proper grade, the concrete sidewalk along the street at the alley's mouth had been broken up and an excavation made ten inches deep and fifteen feet wide. The edge of the broken sidewalk, at the south side of the excavation, was jagged, "like saw teeth" three-eighths of an inch in length. There was a dim red light in the middle of the excavation, and the hole was not fenced. Plaintiff crossed over the excavation early in the evening on her way to a theatre, and saw the red light. She returned about ten o'clock, coming from the north along the sidewalk, crossed the excavation to the south side without difficulty, and as she attempted to step up onto the sidewalk her instep struck one of the projections on its edge and she was thrown down and injured. The night was dark and the red light too dim to enable her to see the projection. *Held*, that she had actual knowledge of the excavation, knew how deep and wide it was, and the darkness made it all the more incumbent on her to look out for dangers, including the projection, and she was guilty of such contributory negligence as prevents a recovery of damages.
4. ———: ———: ———: **Darkness.** To walk into and across a hole ten inches deep and fifteen feet wide in a concrete sidewalk, of whose existence and condition the traveler has actual knowledge, in nearly absolute darkness, without being specially careful and without feeling her way as an ordinarily careful person would, is contributory negligence.
5. ———: ———: ———: **Jagged Edges.** Where the traveler knew that the broken place and deep and wide hole in the concrete sidewalk, made by a contractor with the city in bringing an alley to proper grade, which she attempted to cross over on a dark night, was incomplete and unfinished work, she was put upon notice and bound to look for and anticipate dangers connected with it, including the jagged edge of the broken line of the sidewalk and the danger of tripping when her feet came in contact with its sharp projections.

Appeal from St. Louis City Circuit Court.—*Hon. Frank Landwehr*, Judge.

AFFIRMED.

Sale & Frey for appellant.

(1) Any person, and particularly a contractor who creates an excavation in a public highway, is bound at

common law to keep such place so guarded and in such a condition that pedestrians using the highway will not be injured. *Williamson v. Mullins*, 180 S. W. 395; *McDonald v. Transit Co.*, 108 Mo. App. 374; *Wiggins v. St. Louis*, 135 Mo. 566. It makes no difference whether the pedestrian falls into the excavation or is injured in stepping out of it. *Louisville v. Nicholls*, 165 S. W. 660; *Bowman v. Ogden City*, 33 Utah, 196, 93 Pac. 561; *Asher v. City of Council Bluffs*, 164 Iowa, 661. This duty was declared very definitely in City Ordinance 1139 of the Revised Code of St. Louis, introduced in evidence. *Schlinski v. City of St. Joseph*, 170 Mo. App. 380; *Ryan v. Kansas City*, 232 Mo. 471. Where there is a danger light in an excavation out towards the street where the natural inference would be that it was placed there to warn the drivers of wagons not to drive in an alley which was being made, it cannot be said to be a warning to pedestrians not to use the excavation. Such a light was neither proper at the common law nor under the ordinance. *Schlinski v. City of St. Joseph*, 170 Mo. App. 380. (2) The fact that plaintiff knew of the excavation does not charge her with contributory negligence as a matter of law, since she did not fall into the excavation, but sustained her injuries in getting out of the excavation. She had passed over the excavation to the north in safety earlier in the same evening and she had a right to assume, therefore, that the sidewalk was safe when she returned, going to the south. The question of contributory negligence in such character of cases is always one for the jury. *Devlin v. City of St. Louis*, 252 Mo. 203; *Loftis v. Kansas City*, 156 Mo. App. 683; *Willis v. St. Joseph*, 184 Mo. App. 428; *Bar v. Kansas City*, 105 Mo. 550. One need not abandon a convenient method of travel in a public street because of a danger unless the use of the street, under the circumstances, is absolutely inconsistent with ordinary care and the mere fact of the knowledge of the danger is not sufficient to defeat the right of recovery. *Bentley v. Hat Co.*, 144 Mo. App. 612; *Tockstein v. Bimmerly*, 150 Mo. App. 491.

M. N. Hayden and John P. Griffin for respondent.

(1) There is no reversible error in this record for the reason that appellant is not entitled to recover upon any theory of negligence alleged. First, there is a failure of proof of (a) negligence on the part of respondent and (b) any causal connection between any of the negligence alleged and appellant's injury, and, secondly, the evidence of appellant herself establishes beyond question that her injury resulted wholly from her own negligence in failing to raise her foot high enough to reach the sidewalk, as she attempted to step upon it. She knew that she had to step up out of the alley to the sidewalk, but she, nevertheless, permitted her foot to strike against the edge of the sidewalk, thereby causing her to fall. She herself says that the projecting piece of the edge of the sidewalk, about which so much complaint is made, came in contact with her foot at the instep. Necessarily, therefore, a portion of her foot must have gone under, instead of over, the edge of the sidewalk. That situation resulted from her act. As a matter of law, she was guilty of negligence proximately causing her injury and the trial court should have so held. Not being entitled to have her case submitted to the jury at all, and the verdict having been in favor of respondent, there can be no errors, either in instructions or in the admission of evidence offered by respondent, warranting a reversal of this judgment. (a) This court has the power to reverse this judgment only in the event that it believes that error was committed by the trial court "materially affecting the merits of the action." R. S. 1919, sec. 1513; *Freeland v. Williamson*, 220 Mo. 217, 229; *Mann v. Doerr*, 222 Mo. 1, 15; *Moore v. L. Ry. Co.*, 176 Mo. 528, 545; *Mockowik v. Railroad Co.*, 196 Mo. 550, 568. (b) If the record discloses that the evidence offered by plaintiff wholly failed to establish that she is entitled to recover or entitled to have her case submitted to the jury at all, then the verdict of the jury having been in favor of defendant,

there can be no error in any instructions given at the instance of the respondent which can be held to be reversible error. *Wagner v. Elec. Co.*, 177 Mo. 44, 60; *Bradley v. Tea Co.*, 213 Mo. 320; *Trainer v. Mining Co.*, 243 Mo. 359, 371; *Shinn v. Railroad Co.*, 248 Mo. 173, 181; *Shelton v. Light Co.*, 258 Mo. 538; *Boesel v. Express Co.*, 260 Mo. 453; *Moore v. L. Ry. Co.*, 176 Mo. 528, 545; *Mockowik v. Railroad Co.*, 196 Mo. 550, 568; *Schuepbach v. Gas Co.*, 232 Mo. 603, 611; *Putnam v. Boyer*, 173 Mo. App. 394, 401; *Lomax v. Ry. Co.*, 119 Mo. App. 192; *Chapman v. Railroad*, 240 Mo. 592, 601. (c) A judgment will not be reversed where the right result was reached, though the record may show that the proceedings were irregular, or, perhaps, erroneous. *Mockowik v. Railroad Co.*, 196 Mo. 550, 568; *Peterson v. Transit Co.*, 199 Mo. 331, 344. (d) The error which, it is alleged, inheres in an instruction, must be prejudicial in order to warrant a reversal of the judgment. *Mockowik v. Railroad Co.*, 196 Mo. 550, 568; *Bradford v. Ry. Co.*, 136 Mo. App. 705, 711; *Perry v. Van Matre*, 176 Mo. App. 100. (e) Where the verdict of a jury is clearly for the right party it should be upheld, even if there should be error in the giving of instructions. *Fritz v. Railroad*, 243 Mo. 69; *Trainer v. Mining Co.*, 243 Mo. 359; *Quinn v. Railroad*, 218 Mo. 561.

SMALL, C.—Appeal from the Circuit Court of the City of St. Louis.

Suit for personal injuries. The substantial facts are: The defendant contracted with the City of St. Louis to pave, and for that purpose, to take out the necessary subgrade of an alley between Wells and Ridge Avenues in said city, and which intersected or opened into Hamilton Avenue on the west side of and terminated at said Hamilton Avenue. Hamilton Avenue ran north and south, and said alley east and west, thus entering Hamilton Avenue at right angles. Prior to the commencement of the work by defendant, the granitoid sidewalk on the

west side of Hamilton Avenue was continuous between Wells and Ridge avenues, and ran across the mouth of the alley. The defendant's work contemplated grading and paving the entrance into the alley from the west side of Hamilton Avenue, so that teams and vehicles would have egress and ingress to and from the alley into said avenue. This required the cutting away and removal of the sidewalk and curb where they crossed the mouth of the alley, and the excavating of the subgrade of the approach, which work had been completed at the time plaintiff was injured, to-wit, on the night of July 7, 1918. The excavation thus made was ten inches deep, that is, ten inches below the surface of the granitoid sidewalk, fifteen feet wide (the width of the alley), and about twelve to fifteen feet long, the distance from the curb to the property line. The granitoid sidewalk was cut across, east and west, along the line of the excavation, and its edges were left exposed and were part of the north and south sides of the excavation. The plaintiff, a married lady of mature years, living in the neighborhood, passed over the excavation in safety without difficulty in walking north on the sidewalk, just before dark, on the evening of her injury, in going to a picture show. After the picture show, she started to return to her home the same route, going south on the same sidewalk, accompanied by her maid, whom she had met at the show. This was about ten o'clock at night. When they reached the excavation, the maid, walking just in front of plaintiff, crossed over in safety. The plaintiff following immediately behind stepped down into the excavation and walked across it to the south side, without any difficulty. But, as she undertook to step up the ten-inch rise on the south side, her foot caught, she says, on a projection from the edge of the granitoid walk, and she was thrown to the sidewalk and injured. There was no fence around or about the work. There was one red light in the center of the excavation near the curb line. The granitoid walk was six feet wide, and there was an unpaved park-

way about four or five feet wide between the north line of the walk and the curb. There was no other light or lantern on the work.

The petition charged that as plaintiff was stepping up on the south side of said excavation, due to defendant's negligence, as specified in the petition, she fell on the hard granitoid sidewalk and was injured. There were twelve specifications of negligence in the petition: 1st and 2nd, that in cutting the granitoid sidewalk the defendant left the edge thereof in a rough and jagged condition, which rendered said sidewalk dangerous to pedestrians; 3rd and 4th, that it was dark at the time plaintiff was injured, and defendant negligently failed to provide adequate light; that the one lantern which defendant had provided was burning very low and had bricks around it and that thereby plaintiff could not see her way; 5th, that said excavation rendered said sidewalk dangerous to pedestrians at night; 6th and 7th, that defendant failed to provide an adequate covering for or temporary walk across said excavation; 8th, 9th and 10th, that defendant failed to warn pedestrians of their danger, failed to provide a watchman at said excavation, and failed to provide a proper step from the base thereof to the granitoid sidewalk, so that pedestrians could step with greater safety to the sidewalk therefrom; 11th and 12th, that defendant failed to fence off said excavation with a substantial fence, and that the revised ordinances of said city required it to be fenced with such a fence not less than three feet high and two red lights securely and conspicuously posted on or near said excavation.

Besides a general denial, the answer pleaded contributory negligence.

Substantially all of the plaintiff's witnesses testified that there was a red light in the center of the excavation about the curb line. This red light had some bricks around it, which, one of plaintiff's witnesses said, was usual to keep the lamp from being overturned. There

was no other light and no fence or guard around the work.

Touching the condition of the excavation and especially the edge of the granitoid sidewalk on the south side, two witnesses, who were city employees and inspectors on the job, and one civil engineer, testified for plaintiff, in substance, as follows: That one corner of the granitoid walk—the corner nearest the street—was broken off in a semi-circular form, and about seven inches across. That the edge of the sidewalk was cut off reasonably straight except at this corner where it was broken. One of them said that it was as straight as you could break concrete. It was chipped a little, but not very much. It was cut just as evenly as it was possible to cut out concrete. Unless you hit an expansion joint and have to cut through the center of the slab, you will have a ragged edge. It was a very good job. It was as good as you could get in concrete. "It was kind of like a saw-tooth." The civil engineer saw the work after it was completed, but he could see the line where the sidewalk had been cut. It was a saw-tooth edge, the irregularities or projections were from one-eighth to three-eighths of an inch in length; could not say how far apart they were.

A lay witness, who saw the work the next morning, testified for plaintiff: That the edge of the sidewalk on the south side of the alley was not finished at all, kind of sawed. That a corner of the walk towards the street was broken off. That he ran across the street, the night before, when plaintiff was injured, and saw her lying on the sidewalk on the south side of the excavation, near this broken piece. He did not describe the extent of the broken piece or size of the projections which made it "kind of sawed."

The plaintiff's maid testified for plaintiff: That she walked in front of plaintiff, across the excavation all right herself, but plaintiff did not get up and out of the excavation on the south side. That plaintiff fell

while attempting to do so, and the witness turned around, and plaintiff was lying over to the east side of the sidewalk with her legs hanging down in the alley. Her leg was on a broken thing. Witness felt of a piece of broken off sidewalk, it was kind of pointed, it would stick in your hands when you would touch it. After plaintiff fell, witness felt of this sidewalk, and plaintiff's foot at the time was on top of the projection. Both the maid and the said lay witness marked a point on a photograph in evidence right over the broken off corner as the place, they say, plaintiff's foot was when they first saw her after the accident.

Plaintiff testified in her own behalf, substantially as follows: She crossed the alley going to the picture show in safety. She went there alone and came back with her maid. Walked back on the same side of Hamilton Avenue. She came to this alley, stepped down into it, and crossed over to the south side. "When I got to the other [south] side, as I wanted to step my foot caught on a piece of sharp point of the concrete, and I fell forward. There was a red light there near the street. There were bricks around it. It was low down in the ground. You couldn't hardly see it. Could not see where to step down from the north side into the alley. It was dark. It was awfully dark there. My foot caught and I fell as I went to step out on the south side of the alley. It was Sunday night, about ten-thirty. The maid was right in front of me. It was near the street where I fell. Just as I stepped off there was a sharp point sticking out and it threw me over." On cross-examination, she said: "It was not quite dark when I went to the picture show. I could see that the alley was being constructed, when I got there. I stepped down into the alley, walked across it, and then stepped up on the sidewalk on the north side, going to the theater. Came back the same way. Stepped down from the sidewalk, coming back, into the alley from the north side. Had no difficulty; stepped down there all right. Q.

You could see that you had arrived at that alley? A. No, sir, it was dark, I could hardly see. Of course, I knew the alley was there, and stepped down into it from the north side, without falling or missing my footing at all, and walked safely across to the south side. I fell when I went to step up from the alley to the sidewalk on the south side. My maid was walking in front of me. She stepped up on the sidewalk on the south side of the alley in front of me. She was on the sidewalk on the south side, when I fell. Did not see the lamp, when I fell it was back of me. Don't remember when I first saw the lamp. I know it was there. I believe I saw it when I went over. It was in the middle of the alley. It was dark. It was not light enough to see the light. I don't believe I did see it there. I believe it was about the middle of the alley. I saw the bricks around it when I went. I knew, when I came back, that I would have to step down in the alley to walk across it, and knew I would have to step up at the south side onto the sidewalk. I knew that as I was walking across the alley. As I stepped up at the south side just immediately before I fell, one of these projections struck me about the instep. Q. Did you not strike any part of the sidewalk with your toe? A. It struck me here. I know I struck my foot right here, and I fell over. Q. Is what you call the instep? A. Yes, sir. I did not see the part of the sidewalk that struck my instep. I felt it. I did not see it. It was dark. Just felt it. It was one sharp-pointed object that struck my instep. I did not see it at all. I couldn't tell anything about how far it extended out from the sidewalk. I fell forward. I never did get my foot up as high as the sidewalk, the top side of the sidewalk. It caught right here on the sharp point, and I couldn't. The light I saw was red. I did not see the sidewalk, as I was about to step up to it on the south side. It was so dark I could not see where the sidewalk was. Could not see any part of the sidewalk, because I fell so quick.

It was light and shadow there. Did not put my foot up on the sidewalk at the south side, because my foot got caught on the piece of granitoid sticking out. Did not step up on the granitoid, and then slip off, I couldn't, my foot got caught. There was no part of the sidewalk broke under me. The point stuck in my foot, and I fell over. Don't remember whether any other part of my foot went under the sidewalk. All I know about what happened is—this point sticking in my foot, and I fell over. Q. About your instep? A. Yes, sir."

Plaintiff also introduced in evidence, Section 1139 of the Revised Code of the City of St. Louis, which was as follows:

"Excavations in street—to be fenced, etc.—obstructions—red light. Every person who shall cause to be made any excavation in or adjoining any public street, alley, highway or public place, shall cause the same to be fenced in with a substantial fence not less than three feet high, and so placed as to prevent persons, animals or vehicles from falling into said excavations; and every person making or causing to be made any such excavations, and every person who shall occupy or cause to be occupied any portion of any public street, alley, highway, or public place with building materials or any obstruction, shall cause one red light to be securely and conspicuously posted on or near such excavation, building material or obstruction; provided, such obstruction does not extend more than ten feet in length, and if over ten feet and less than fifty feet, two red lights, one at each end, shall be placed, and one additional light for each additional fifty feet or part thereof, and shall keep such lights burning during the entire night."

Defendant's evidence tended to show that the work was done by a sub-contractor under the defendant's directions, but this defense was not insisted on, or submitted in the instructions given for defendant.

At the close of all the evidence the defendant offered a demurrer to the testimony, which the court re-

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fused. The court gave six instructions for the plaintiff. In her instructions, the plaintiff only submitted three grounds of negligence charged in the petition; first, that the defendant negligently left the edge of the grani-toid sidewalk with jagged pieces sticking out of the same; second, negligently failed to post a red light on either side of said excavation; third, negligently failed to cover, guard or fence said excavation.

The court also gave a number of instructions for the defendant, as to some of which the plaintiff assigns error.

The court also permitted the defendant to ask the plaintiff's maid, whether she did not testify, in a deposition which she gave, to the effect, that the plaintiff fell about the center of the walk. But, in view of the conclusion we have reached, it is not necessary to set out any more of the details of the trial, than we have already done.

The jury found a verdict for the defendant. Plain-tiff appealed the case to this court.

I. If defendant was not guilty of negligence, or if its negligence was not the proximate cause of the plain-tiff's injury, or if the plaintiff herself was guilty of contributory negligence as a matter of law, she would have no case to submit to the jury, and, therefore, (the defendant having asked a demurrer to the evidence, which was refused), there could be no reversible error in any instructions given or refused for either party, or in any action of the trial court complained of by the appellant. [Bradley v. Forbes Tea Co., 213 Mo. 320; Trainer v. Mining Co., 243 Mo. 359; l. c. 371; Shinn v. Railroad, 248 Mo. 173; Shelton v. Light Co., 258 Mo. l. c. 541; Boesel v. Wells-Fargo & Co., 260 Mo. 463, and other cases cited by learned counsel for respondent.]

**No Right to
Recover: Error
in Instructions.**

II. It is the settled law in this State that, while a traveler on a public street or sidewalk may ordinarily

presume that the way is clear and in good condition, still, if the traveler knows that the sidewalk or street being used by him is torn up or obstructed by public work being done therein, he cannot go forward, relying on the presumption that the way is clear, but must exercise his faculties to see and discover the dangers that he may encounter from such obstructing public work, and if he fails to do so, and is injured thereby, he cannot recover, on the ground that he himself is guilty of contributory negligence, although the public authorities or the contractor doing the work, may also have been guilty of negligence. [Welch v. McGowan, 262 Mo. 709; Wheat v. City of St. Louis, 179 Mo. 572; Ryan v. Kansas City, 232 Mo. 471; Craine v. Met. St. Ry. Co., 246 Mo. 393; Woodson v. Met. St. Ry. Co., 224 Mo. 685; Kaiser v. St. Louis, 185 Mo. 366; Brady v. St. Joseph, 167 Mo. App. 425; Cohn v. Kansas City, 108 Mo. 387.]

In *Wheat v. City of St. Louis*, 179 Mo. *supra*, the plaintiff was injured by driving over a pile of earth surrounding a manhole which projected several feet above the surface of the street. The condition had existed for a year, and he was perfectly familiar with it. Held, although the city was guilty of negligence by permitting the obstruction, plaintiff was guilty of contributory negligence, as a matter of law, in not avoiding it. In that case, it was a dark, foggy morning, but it was light enough to see the obstruction had plaintiff looked with reasonable care. The court said at page 579:

"The plaintiff in this case knew of the obstruction in the street, and knew that by the exercise of ordinary care he could avoid striking it while traveling along the street. His act in striking it was, therefore, *per se*, contributory negligence. [Citing many cases.] . . . In *Cowie v. Seattle*, 4 Mun. Corp. Cas. 417, the Supreme Court of Washington held, that a person who was perfectly familiar with the condition of a sidewalk in which a defect exists, has no right, while using it, to act on the ordinary presumption that it is in good condition. . . .

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And at page 582: 'While the city owes the citizen the duty to keep the highways reasonably safe for persons to pass over, the citizen owes the city the duty to use his God-given senses, and not to run into obstructions that he is familiar with, or which by the exercise of ordinary care he could discover and easily avoid.' "

In *Welch v. McGowan*, 262 Mo. 709, the plaintiff was driving on 13th Street in Kansas City. The defendant had dug a ditch on the south part of the roadway, and had laid a string of gas pipe along the ditch, preparatory to laying the pipe therein. The plaintiff's witnesses testified that one of the gas pipes projected out from one to six feet in the portion of the roadway left open for travel north of the general line of the work and the other pipes. The front wheel of the plaintiff's buggy struck this pipe and threw plaintiff out and seriously injured him. This court held that plaintiff was guilty of contributory negligence, as a matter of law, in failing to discover and avoid the pipe, and could not recover, although defendant may have been guilty of negligence in allowing the pipe to project out into the street. The court said at page 719:

"The accident occurred in daylight, and plaintiff's eyesight was not impaired. The gas pipe which he struck was lying on comparatively level ground, and had he exercised the diligence which the law and ordinary prudence calls for, under the circumstances, he would have seen the pipe in ample time to have driven around it.

"We have not been able to find any case where the facts were precisely the same as in this case, but the following decisions announce the rule, that when one traveling along a public street sees, *or otherwise receives actual notice, that such street is out of repair or torn up, he must look for obstructions and other dangers* and avoid them if he can do so, by exercising ordinary care. [*Phelan v. Paving Co.*, 227 Mo. 666, 1. c. 705-6; *Nessler v. Housewrecking Co.*, 156 App. Div. (N. Y.) 348, 350; *Nolan v. King*, 97 N. Y. 565, 1. c. 571-2; *District of Columbia v. Moulton*, 182 U. S. 576.] The same rule

seems to apply where a person traveling any public highway has actual knowledge of an obstruction therein. [Wheat v. City of St. Louis, 179 Mo. 572, 64 L. R. A. 292.]”

In the Welch Case, the plaintiff testified he did not see the gas pipe he struck, but he admitted that he knew that the street was cut open for the purpose of burying a pipe or making some other change therein. In view of this fact, the court said on page 718: “With [this] the actual knowledge on the part of plaintiff, it was his duty to keep a diligent lookout for obstructions *which might be* temporarily in the street by reason of the work that was being done therein, and to *anticipate* noises which might frighten a team If it is true, that defendants were negligent in allowing one end of the gas pipe to protrude into that part of the street left open for travel, this did not relieve plaintiff of the duty of keeping a lookout for temporary obstructions after he observed that the street was torn up, or partially torn up; so, we find that the plaintiff’s injury was the direct result of his own carelessness in failing to look where he was driving.”

In Robison v. Kansas City, 181 S. W. 1004, where the plaintiff was injured by falling into an excavation in the street at night, of which she had no previous knowledge, and it was so dark she could not see, Court in Banc, while holding that the above cases did not apply in that case, affirmed the doctrine laid down in said cases, which it announced as follows, pages 1005-6:

“The doctrine announced in these cases, about which there is no controversy except as to its application here, is that if a pedestrian with knowledge of a defect or obstruction in a street or sidewalk uses same and is thereby injured, he is guilty of such contributory negligence as to preclude recovery.

“The facts in the cases cited by defendants are not parallel with those in the case at bar. There the injuries complained of were received in the daytime. Here they were at night, and so great was the darkness that

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plaintiff could not see her husband, who preceded her but a few steps on their way homeward. The darkness was due, so far as the city was concerned, to its negligence in not keeping the arc light burning at the intersection of the streets, and so far as the Parker-Washington Company was concerned in its failure to erect a barrier and to keep warning lights at the point where the excavation had been made.

"There in each of the cases cited, evidence of the plaintiff's knowledge of the defect or obstruction was shown. Here the only evidence was that plaintiff could not see the intersection of the streets in question from her home, and not having been to Lauderdale's store since the grading began until the night of the accident, *did not know the location of the excavation.*" (Italics ours.)

In the case at bar, the plaintiff was familiar with the excavation, having seen it before dark in passing over it a few hours before her injury. Knew how deep and wide it was. How far she would have to step down and step up to cross it and that "the alley was being constructed," that is, she knew the work was unfinished. She must also have seen that the edges of the concrete walk were in the sides of the excavation, and she says she did see the red light on the work, when she crossed over going to the theater. The fact, that it was dark when she returned, made it all the more incumbent on her to look out for dangers and difficulties in passing over this unfinished and temporary crossing, which she knew was not in a completed condition, fitted for ordinary or permanent use by pedestrians. But, while she says it was dark at the time she returned, and was injured, yet her evidence shows that it was not so dark but that she knew when she reached the work and could see well enough to step down and walk across it without any difficulty or assistance from her maid, who immediately preceded her and crossed completely over without injury or trouble. If so, it must have been light enough for the plaintiff to step out of the cut without injury by the exercise of due care, because if any dif-

ference, it required more light for her to discover the excavation and to step down and into and across it, than to step up and out of it, after she had discovered it and knew she was in it. The physical facts thus testified to by plaintiff and her maid nullify her evidence to the effect that it was so dark that she could not see to step out of the excavation.

We, therefore hold, that plaintiff's own testimony shows that she was guilty of such contributory negligence as prevented her having any case for the jury.

III. But let us assume it was as dark as plaintiff says it was.

In *Diamond v. Kansas City*, 120 Mo. App. 185, the plaintiff was injured at night by falling into a hole in a plank sidewalk. The walk was elevated some four or five feet above the ground, and one of the hand-rails was missing. Plaintiff was familiar with the walk and knew that several planks six or eight inches wide were absent, but did not remember the exact location of the opening into which he fell. The night was dark and the street lamps out. And plaintiff's vision was further obscured by smoke from the railroad yards nearby. The walk had been in that condition for a month or more, and the holes had been observed by plaintiff when he went to work that evening. He was injured when returning home about midnight. The court held, he was guilty of such contributory negligence as precluded recovery. The court said at pages 189-90:

"The facts before us do not warrant the inference that the few openings in the sidewalk in all events necessarily menaced the safety of a pedestrian, particularly that of one who knew of their presence. Except when surrounded by utter darkness, plaintiff by giving ordinary attention to his course easily could have avoided stepping into any of them. But being plunged into what he pictures to be complete darkness, and knowing that the holes were there, his conduct in proceeding at the gait and in the manner he walked in the daytime ap-

pears to be palpably negligent. He neither attempted by using the one good hand-rail to provide himself with the means of recovering his balance should he make a misstep, nor did he feel his way with his feet and thus make sure of the safety of his footing before placing his weight on the advancing foot, as people usually do who are compelled to grope in darkness. It is true, contributory negligence is an affirmative defense, but plaintiff's own statement of what he did shows that he made not the slightest effort to avoid the dangers, which, from the fact of darkness, were threatening in the highest degree. And there is nothing in the record from which the inference may be drawn that he acted with reasonable care. He trusted entirely to chance to escape and, assuming that the distance of each of his steps was approximately thirty inches and that he had to pass over three transverse openings in the sidewalk, he had no more than an even chance of missing a fall. Thus, the danger under all the circumstances in the situation was such that it certainly menaced his safety and, as he utterly failed to take any measures to avoid it, his own negligence stands forth indisputably as the producing cause of his injury and precludes recovery."

We think, the above ruling of the learned appellate court is sound law and applicable to this case. If it was as dark as plaintiff claims it was, she walked into and across the cut without being specially careful in nearly absolute darkness and took no special care and did not feel her way when she came to the south side and attempted to step up on to the granitoid sidewalk, as an ordinarily careful person would have done under the circumstances—if it was as dark, or anything like as dark, as plaintiff says it was.

IV. But, it is strenuously argued by appellants's learned counsel that while plaintiff knew of the fact that there was a cut there, and that she would have to first step down, and then up about ten inches in crossing

Jagged
Edges.

it, she did not know of the jagged points on the edge of the concrete on which her foot was caught. But her evidence shows she did know that it was an incomplete and unfinished public work, and, therefore, under the Welch Case, supra, she was put upon notice and was bound to look out and anticipate dangers connected with the work, which included stumbling or tripping on the exposed edge of the concrete walk, which she knew she would have to encounter and step over in again crossing the excavation as she returned home. The red light was also a warning to look out for danger.

It is self-evident that if plaintiff had exercised anything like the care which, with her admitted knowledge of the situation and circumstances which surrounded her, the law demanded of her, she never would have been injured, and, therefore, she was not entitled to recover in this case.

Let the judgment be affirmed. *Ragland, C.*, concurs; *Brown, C.*, not sitting.

PER CURIAM:—The foregoing opinion by *SMALL, C.*, is adopted as the opinion of the court. All of the judges concur; *Graves, J.*, in separate opinion in which *Blair, C. J.*, concurs.

GRAVES, J. (concurring).—I concur in this opinion except as to the citation of *Welsh v. McGowan*, 262 Mo. 709. Having heretofore read the record in that case, I do not desire to be in the attitude of endorsing the result there reached. The general principles of the law are properly announced in *Welsh's* case, but the facts were misapplied to those principles. I mean the record facts. There is a difference between stated facts and record facts. *James T. Blair, J.*, concurs in these views.

KATHERINE D. ROMAN, Appellant, v. JOHN C. KING.

Division One, July 23, 1921.

1. **STEPS TO DOUBLE FLAT: Repair: Duty of Landlord.** Whenever the owner of a house demises a portion of it to which access is had by way of halls, stairways or other approaches to be used in common with the owner or tenants of other portions of the same, the owner, by such transaction, retains as to the tenant the possession and control of such undemised facilities and it is his duty to keep them or to use reasonable care to keep them in safe condition for the use of the tenant in the enjoyment of his possession. Where there was a double flat house, consisting of an upper and lower story and fronted by a common one-story porch, from which a single set of steps led down to the granitoid walk, the owner of the house, having leased the two stories to different tenants from month to month, for residence purposes, retained such possession and control of the steps as made it his duty to keep them or to use reasonable care to keep them in a safe condition for the use of both tenants.
 2. ———: ———: ———: **Invitation to Use.** One who invites another to come upon his premises is bound in law to see that those premises are in such condition that the invitation may be safely accepted; and a lease, by which the landlord, by the very act of leasing them, retains the control and possession of the undemised steps leading into a double flat used for residence purposes by different tenants, is an invitation to such tenants to enter the flat by such steps, and it is his duty to so maintain them that each of the tenants can enter the flat in safety, and if he neglects to so maintain them he is liable for any injury to the tenant caused by such unsafe condition.
 3. ———: ———: ———: **Eviction.** The refusal of a landlord to maintain entrance steps to his double flat house used by his tenants from month to month for residence purposes, in such condition that they may enter and depart in safety, is a method of wrongful eviction.
 4. ———: **Knowledge of Unsafe Condition: Continued Use: Contributory Negligence.** The use by a tenant of the front steps to a double flat leased to different parties from month to month for
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residence purposes, after knowledge of their dangerous condition, is not of itself conclusive evidence of lack of due care, since such knowledge does not require the tenant to desist from using them in a careful manner, nor render a careful use of them contributory negligence. The law does not encourage the wrongdoer to interpose his wrong as a defense against one who has suffered from its effects. The law will not compel a tenant, without good reason, to abandon her front door, the full and free use of which in safety is included in her monthly rental, and make use of a safe set of back steps.

5. ———: **Repair of Other Steps: Evidence.** Plaintiff sued her landlord for personal injuries due to the unsafe and rotten condition to the front entrance steps to a flat, one story of which she had leased. Some time previously the defendant had employed a carpenter to repair the back steps, and this carpenter took to defendant a note on which plaintiff had written: "All work is done right." There was no evidence connecting the paper with the subject of the suit, while the testimony of defendant shows affirmatively that there was no such connection. *Held*, that the admission of the paper in evidence was prejudicial error against plaintiff.
6. ———: **Meddling With Loose Step: Contributory Negligence.** For the tenant to move the loose end of a wooden step—loose because the wooden carrier is rotten—six or seven inches, and then to put it back in the position it had occupied before, or to pick it up and show it to her neighbors and then to put it back where it was before, does not constitute an act of negligence, and does not fix upon such tenant responsibility for her injury when, subsequently, in descending the steps, said step slipped from under her foot and thereby she was thrown to the ground; and an instruction which tells the jury that such acts constitute contributory negligence which bars her recovery of damages from her landlord for such injuries is in effect a peremptory instruction to find for defendant; and is highly prejudicial to her. It is not the law that if the tenant meddles with a step leading to her leased premises in the interest of her own safety, the owner is released from all liability for negligence in creating a situation so dangerous that safety required its correction.
7. ———: **Duty of Landlord and Tenant: Negligence.** It is the duty of the landlord to exercise reasonable care to keep entrance steps to a double flat building in a safe condition for the use of the tenant of one of the stories and of all persons having social or business relations with her, and she is entitled to the free and constant use of the steps as a necessary adjunct to the enjoyment of the leased premises, and the law does not require her to cease

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that enjoyment the moment the landlord chooses to permit the steps to become dangerous, but she may continue to use them, the exercise of reasonable care to be determined in view of the extent and nature of the danger created by the owner's neglect or refusal to perform his duty, and if upon due notice or with knowledge of the dangerous condition he fails to make necessary repairs and she is injured by said unsafe condition she is entitled to recover from him her damages.

Appeal from St. Louis City Circuit Court.—*Hon. M. Hartmann, Judge.*

REVERSED AND REMANDED.

W. B. & Ford W. Thompson for appellants.

(1) The instruction given for the plaintiff in a negligence case, (saving and excepting in cases of *res ipsa loquitur*) must confine the jury to the specific acts of negligence set out in the petition, and it is error to give a general instruction to the effect that if they find the defendant was negligent then plaintiff was entitled to recover. Likewise, where there is a good and sufficient plea of contributory negligence, wherein the specific acts of contributory negligence are stated, the court should not give a general instruction to find for the defendant, if they find that plaintiff was also guilty of negligence contributing to the injury, without restricting the finding to the acts of contributory negligence thus specifically stated in the answer. *Buesching v. Gaslight Co.*, 73 Mo. 219; *Mitchell v. Clinton*, 99 Mo. 152; *Fulks v. Railroad Co.*, 111 Mo. 335; *Baker v. Ry. Co.*, 147 Mo. 140. (2) Defendant's instruction No. 4 is erroneous and should not have been given. There is no evidence that plaintiff "after moving the tread from the position it occupied on the risers supporting it" then undertook to place said tread back in its proper place, but did so in such a manner that when she shortly thereafter passed down said steps and went upon said tread, it became displaced and caused her to fall.

The evidence upon this feature of the case is all one way and uncontradicted, and to the effect that she placed it back in position upon the riser, just as it had been before she moved it. Further, the instruction assumed that the step before she moved it had been in its proper position, which assumed that it had been perfectly safe and would have remained perfectly safe but for the "manner" in which she placed it back, which assumption entirely contradicts the entire facts disclosed by the record. According to plaintiff the step was so loose and had remained so loose for a very long time, that one end of it could be moved out six or seven inches, while according to defendant (his mother-in-law and sister-in-law being the witnesses who shed this light upon it for defendant) it was so loose that plaintiff pulled it off the riser entirely and held it up in the air. Yet, this instruction told the jury that the step was so safe with that step resting, even thus loose, upon the riser as to exonerate the defendant for failure to repair it and make it reasonably safe, if only the jury could find that the plaintiff had placed this step back in such a manner that it afterwards slipped out as she was descending the stairway. (3) The principle of law upon which the petition of the plaintiff is based, and upon which the jury were instructed on behalf of the plaintiff, is that announced in the decision of *Miller v. Geeser*, 193 Mo. App. 1, and *Home Realty Co. v. Carius*, 224 S. W. 751.

Kinealy & Kinealy for respondent.

(1) If plaintiff was not entitled to recover, the question as to error in the instructions becomes immaterial. *Giles v. Railroad*, 212 S. W. 873; *Bradley v. Tea & Coffee Co.*, 213 Mo. 320; *Trainer v. Mining Co.*, 243 Mo. 359; *Hurek v. Railroad*, 252 Mo. 39; *Frick v. Ins. Co.*, 223 S. W. 643. (2) In no event can a landlord be held liable for injuries unless it is shown that he retained control of the alleged defective premises.

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Bender v. Weber, 250 Mo. 551; Kilroy v. City of St. Louis, 242 Mo. 79; McGinley v. Trust Co., 168 Mo. 257; Troth v. Norcross, 111 Mo. 630; Marcheck v. Klute, 133 Mo. App. 281; Land v. Hill, 157 Mo. App. 685. (3) Plaintiff in going upon the step in question was guilty of contributory negligence. 20 Cyc. 112; Town v. Armstrong, 75 Mich. 580; McGinn v. French, 107 Wis. 54; Martin v. Surman, 116 Ill. App. 282; O'Dwyer v. O'Brien, 43 N. Y. Supp. 814; Reams v. Taylor, 31 Utah, 288; Wheat v. St. Louis, 179 Mo. 572; Woodson v. Ry., 224 Mo. 685; Cohn v. City of Kansas, 108 Mo. 387; Sindlinger v. City of Kansas, 126 Mo. 315. (4) To be "without fault" in doing an act comprehends the use of ordinary care. Burdoin v. Trenton, 116 Mo. 358. (5) A party may not complain of instructions which are in harmony with one given at his request. Traubberger v. Railroad, 250 Mo. 46; Gordon v. Park, 219 Mo. 600; Lange v. Railroad, 208 Mo. 458; Christian v. Ins. Co., 143 Mo. 460. (6) The proximate cause is the one which in a natural and continuous sequence produces the result. Hudson v. Ry., 101 Mo. 1. (7) A danger need not be glaring and imminent before a plaintiff can be found guilty of contributory negligence. Bradley v. Ry., 138 Mo. 293; Bennett v. Lime Co., 146 Mo. App. 565. (8) One who voluntarily assumes a position of danger does not exercise ordinary care. 29 Cyc. 519; 20 R. C. L. 108.

BROWN, C.—Suit for damages sustained by falling on the steps of a two-story flat building known as Numbers 3209 and 3209A North Newstead Avenue, in the City of St. Louis, owned and leased as residences by defendant. The plaintiff was tenant of the upper flat. A porch extended across the entire front on Newstead Avenue, which was reached from the street by a granitoid walk to the steps about the middle of the porch. These consisted of a lower step of granitoid, and four wooden steps leading from it to the porch floor. Each flat was reached by a front door leading into the house from

this porch, which was not divided by rail or otherwise, but was common to both flats. There was also a back door, reached by stairs. The plaintiff occupied the upper flat as tenant from month to month of the defendant, the lower flat being occupied by a tenant holding by like tenure.

After stating these facts the petition proceeds: "That upon the eighteenth day of May, 1914, while plaintiff, in the exercise of ordinary care upon her part, was passing over and down said flight of wooden steps in going from the front door of said upper flat to the ground, and using said steps for the purpose of egress therefrom, in the usual and customary manner, without fault upon her part one of the wooden steps of the flight of wooden steps above mentioned became entirely loose and unfastened from the wooden carriage upon which said step was resting and slipped from under plaintiff's foot, and thereby plaintiff was thrown on a stone step at the bottom of said flight of wooden steps and fell in such manner that she sustained serious and permanent injuries to her body and nervous system."

After stating the nature of plaintiff's injuries which were serious the petition proceeds as follows:

"Plaintiff states that said flight of steps upon which she was injured were at the time of said injury in the possession of and under the control of the defendant and constituted a common stairway for the common use of defendant's tenants occupying the upper and lower flats of defendant's said two-story flat building, and that by reason thereof it was the legal duty of defendant to keep the same in a reasonably safe condition for the ordinary and necessary use of plaintiff as a tenant of the upper flat of said building. Plaintiff states that in violation of said duty said defendant negligently permitted said step to be and remain out of repair and in an unsafe and dangerous condition at the time of and for a long period of time prior to the date of said injury, in this, to-wit, that one of the boards constituting the step

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or tread of said common stairway on one side thereof was loose and unfastened by reason of the wooden carriage upon which said step rested having become so rotten and decayed that said board or step could not be nailed or fastened thereto, as it would not hold a nail driven into it on said side, and said board or step in its said loose and unfastened condition had become and was unsafe for persons lawfully using the same, and that defendant knew, or in the exercise of ordinary care could have known, that said step was out of repair and unsafe and in a dangerous condition."

Damages are alleged and asked in the sum of \$25,000. The answer, after a general denial, pleads contributory negligence as follows:

"Further answering, defendant says that any injuries which plaintiff may have sustained upon the occasion referred to in the petition were due to her own negligence directly contributing thereto, in that shortly prior to the time she fell she negligently moved said step from the position it had theretofore occupied, and in that she negligently placed the board step in the place and position in which it was at the time she fell, and in that she negligently went upon said step knowing the condition in which same was at the time." Issue was joined by replication.

The four wooden steps leading up to the front porch were supported upon carriers of wood, and for a long time one of them had been loose at one end so that it could be moved out several inches in front of the riser beneath it. The tenants of the respective flats washed the steps alternately. The loose step had first been observed in that condition in December previous to the accident, which occurred May 18, 1914, and the plaintiff had, on several occasions, driven nails into the loose end, but the wooden carrier was so rotten that these would not take hold of it. Plaintiff, about two weeks before the accident, directed defendant's attention to its condition and told him she would move out unless he fixed

it, which he promised but failed to do until after the accident occurred. Mr. King, the defendant, denied this, and says in substance that if a tenant should so address him he would tell him to move out.

On the day of the accident the plaintiff was descending the steps with a pan full of chicken feed held in front of her; the loose steps slipped out and she fell down the steps, striking on her head and back, suffering thereby the injuries complained of.

She knew the step was loose because she had attempted to nail it down. She says she knew it was bad, but did not know how bad. She had climbed up and down them several times the same day. She said that whenever she noticed it was loose she put a nail in it, but never thought of getting hurt herself. In answer to a question upon her cross-examination as to what she had done with it that morning before she was hurt she said: "Why, I pulled it out a little bit like that, showed it to Mrs. Hogan and her daughter, and *pushed it back in place and placed it back the way I always did.*"

The condition of the step was described by a policeman who saw it just after the injury as follows: "The step itself was all right, but the carrier was rotten." He said he had walked on it as he went up without noticing its condition; that this step was the second from the bottom.

The evidence that the carrier which supported it was rotten seems to be unquestioned. When it was repaired about an hour after the accident defendant was present. The carrier was thrown into the scrap heap and disappeared.

The defendant testified that in 1913 he employed one Settemore, a carpenter, to fix the *back porch* used in connection with plaintiff's flat; that by check dated November 5, 1913, he paid this carpenter \$116.89 and received from him a note signed by plaintiff as follows: "All work is done all right." Although the defendant, being on the stand at the time, gave no evidence tending

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to show that this work had anything to do with the front porch steps, the court, against the objection of the plaintiff, permitted the check and note to be placed in evidence before the jury. The testimony of plaintiff was that he employed this carpenter to fix the back porch; that he knew of no other work that he did and that he came to him for his pay with this note. The plaintiff duly excepted to the ruling of the court in admitting these papers.

After the evidence was in the defendant asked that the jury be instructed to return a verdict for the defendant, which was refused. The court then gave for plaintiff the following instruction:

(1) The jury are instructed that if you find and believe from all the evidence that defendant was the owner of the premises known as Numbers 3209 and 3209A North Newstead Avenue, in the City of St. Louis, and that on said premises there was a double flat building and that the upper flat, known as 3209A was occupied by plaintiff and her husband and family, as the tenant of defendant, and that the lower flat, known as 3209 North Newstead Avenue, was occupied by another family, and that the front entrance to said upper flat opened upon a porch, and that from said porch to the ground there was but one set of steps, and that said one set of steps was used by the occupants of each of said flats (upper and lower) in common as a common ingress and egress from the respective flats, then it was the duty of defendants, as the owner and landlord, to use reasonable care and diligence to keep and maintain said set of steps in a reasonably safe and fit condition for such use by the plaintiff; therefore, if you further find that on the day plaintiff was injured the said steps were not in a reasonably safe and fit condition, and that defendant either knew their condition, or by the exercise of ordinary care might have known their condition, and that defendant either knew said condition or might by the exercise of ordinary care have known it for such length of time before plaintiff was injured as to have given him a reasonable oppor-

tunity and time to have repaired it before plaintiff was injured, and you further find and believe that, notwithstanding said fact defendant failed to put said steps in a reasonably safe condition, and that as a direct result of defendant's said failure plaintiff, while making use of said steps and while descending said steps, without fault upon her part, as mentioned in other instructions, suffered an injury, then your verdict should be for plaintiff, and by the words 'reasonable care and diligence,' as used in this instruction, is meant such a degree of care and diligence as may reasonably be expected to be made use of by a man of ordinary intelligence, prudence and caution under like circumstances and conditions."

Against the objection of plaintiff it gave for defendant the following instructions to which action the plaintiff duly excepted.

"3. The court instructs the jury that in no event can you find in favor of the plaintiff unless you believe from the evidence that the defendant failed to exercise ordinary care to keep the step in question in a reasonably safe condition and repair, and that the plaintiff exercised ordinary care for her own safety at the time she fell.

"4. The court instructs the jury that if you believe from the evidence that on the morning that plaintiff claims to have received her injuries she intentionally moved the tread of the step in question with her hands, either entirely or partially from the position it occupied on the risers supporting it, and that plaintiff then undertook to place said tread back in its proper position, but did so in such manner that when she shortly thereafter passed down said steps and went up on said tread it became displaced and cause her to fall, then plaintiff is not entitled to recover, and your verdict must be for the defendant.

"5. The court instructs the jury that if you believe from the evidence that on the occasion when plaintiff received the fall testified to by her she knew the condition of the step which she went upon and that in going

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upon same on that occasion she failed to exercise the care which an ordinarily prudent person would have exercised under the same circumstances, and that by reason thereof received the fall of which she complains, she is not entitled to recover, and your verdict must be for the defendant.

"6. The court instructs the jury that if you believe from the evidence that shortly before plaintiff received the fall of which she complains she lifted up the tread board of the step described by her and then negligently laid same down on its support so that it was likely to cause her to fall if she stepped upon same, and that she thereafter, while said board was in the same position in which she had placed it, if you so find, stepped upon said board and that same moved and caused her to fall, then your verdict should be in favor of the defendant.

"7. The court instructs the jury that if you believe from the evidence that when plaintiff went upon the step in question she knew its condition, and knew of the danger, if any, of her falling if she went upon same, and that she determined to take the chance of going upon the step, then she is not entitled to recover, and your verdict should be for the defendant."

The jury under the instructions returned a verdict for defendant, upon which the judgment appealed from was entered, and this appeal was taken.

I. We are called upon in this case to determine the liability of the owner of a house containing two separate tenements known as flats leased by him to separate tenants having no contractual relation whatever with each other, with respect to the premises, for his failure to keep the common approach to the house in a safe condition, by reason of which one of them was injured. Before proceeding to the facts presented by the record of the trial below we will briefly notice the principles relating to such liability. These have, as might be expected, received frequent notice from the courts of both this country and England.

Duty of
Landlord.

The doctrine of the English courts may be illustrated by the cases of *Miller v. Hancock*, 2 Q. B. D. (1893) 177, l. c. 180, and *Hargroves & Co. v. Hartopp*, 1 K. B. D. (1905) 472. In the first of these cases the defendant was the owner of premises leased in flats to tenants. The plaintiff was collector for a railway company, who in that capacity called upon the tenant of one of these flats and in coming down the staircase, through a defect in the stair, fell and broke his leg. *BOWEN, L. J.*, said: "The tenants could only use their flats by using the staircase. The defendant, therefore, when he let the flats, impliedly granted to the tenants an easement over the staircase, which he retained in his own occupation, for the purpose of the enjoyment of the flats so let. Under those circumstances, what is the law as to the repairs of the staircase?" He then proceeded to hold that under these circumstances the landlord had given the tenant a right to use the staircase and undertaken to keep it reasonably safe for the use of the tenants and also of those persons who would necessarily go up and down the stairs in ordinary course of business with them. He concluded that the creation of the relation of landlord and tenant in such a case would be an absurdity if not founded upon such an implied duty. His conclusion was founded upon the reasoning of Lord MANSFIELD in *Taylor v. Whitehead*, 2 Douglas, 745. In *Hargroves & Co. v. Hartopp*, this case was followed by Lord ALVERSTONE, C. J., who, in commenting upon the opinion of *BOWEN, L. J.*, in the *Miller Case*, said that he understood it to mean that the duty to repair was coextensive with that created by express covenant; that is to say, that it was an absolute duty to keep the premises in safe condition at all events, and not merely a duty to take reasonable care to do so. He expresses some doubt as to the absolute nature of the duty, but declined to decide the point, placing his decision upon the ground of the failure of the landlord to exercise reasonable care. This is the general doctrine of the courts in this country. [*Sawyer v. McGillicuddy*, 81 Mo. 318; *Shipley v. Fifty Associates*, 101 Mass. 251;

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Looney v. McLean, 129 Mass. 33; Home Realty Co. v. Carius, 224 S. W. (Ky.) 751; King & Metzger v. Cassell, 150 Ky. 537; Kansas Investment Co. v. Carter, 160 Mass. 421; Bissell v. Lloyd, 100 Ill. 214; O'Connor v. Andrews, 81 Tex. 28.]

This doctrine was definitely adopted by this court in McGinley v. Trust Co., 168 Mo. 257, which was followed in Turner v. Ragan, decided at the last term of this court and not yet reported at this writing. It is supported by reasoning which seems to us unanswerable, and may be stated in its direct application to this case as follows: Whenever the owner of a house demises a portion of it to which access is had by way of halls, stairways or other approaches to be used in common with the owner or tenants of other portions of the same premises, the owner, by such transaction, retains as to the tenant the possession and control of the undemised facilities, and it is his duty to keep them or to use reasonable care to keep them in safe condition for the use of the tenant in the enjoyment of his own possession. Without the application of this rule in his favor the tenancy is a farce, and the tenant from month to month, as in this case, may be evicted without notice by the simple refusal of his landlord to maintain the only means of access. The principle is well illustrated by the evidence in this case, in which the owner testified that if his tenant had threatened to leave unless such repairs should be made as to enable her to enter her apartments with safety, he would simply have told her to go. It is impossible that the application of the rules of the common law should create such a condition.

It is a principle too well established to be now thoughtlessly abandoned that one who invites another to come upon his premises is bound in law to see that those premises are in such condition that the invitation may be safely accepted. In this case the lease was an invitation to the plaintiff to enter the flat by the way already apparently provided. In return the owner exacted a monthly rental. She could only enter by cross-

ing his own premises by the use of the steps that gave way under her feet, and she was entitled to have them maintained so that she could do so in safety. Her rights under the lease constituted the measure of his duty in that respect.

The property was constructed for the purpose of a residence, and was so used. This use implies free entrance and exit for business and social purposes, and the most of the cases to which we have already referred hold that all persons so entering and leaving do so upon the implied invitation of the owner and are equally entitled to the same protection as the tenant himself.

There is one branch of the same question to which we should advert before proceeding to the facts of this case. We have already noticed the effect of failure to maintain the facilities for safe entrance upon and exit from the premises as a method of wrongful eviction, as was so plainly suggested by defendant in his testimony. This has made necessary another rule which has become thoroughly established in our jurisprudence, and is expressed by the Kentucky Court of Appeals in *Home Realty Co. v. Carius*, *supra*, as follows:

“It is urged that plaintiff’s equal knowledge with defendant of the condition of the steps bars her right to recover herein. We cannot agree with this contention. These steps constituted practically the only means of access to the two apartments, and were used by both tenants, facts necessarily known to the landlord. Because of their inaccessibility and condition the other entrances were seldom used. Mere continued use of a common passageway, after knowledge of its dangerous condition, is not of itself conclusive evidence of a lack of due care on the part of the tenant, since such knowledge does not require the tenant to desist from using same in a careful manner, nor render the careful use of same contributory negligence. [*Looney v. McLean*, 129 Mass. 33.]”

We think the proposition expressed in these and other cases is a sound one. We do not think the law should encourage the wrongdoer in interposing his own

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wrong as a defense against one who has suffered from its effects. It is true that in this case the plaintiff had access through a rear door to her back yard, and we will presume that this way wound somewhere safely to a street. It may also be that under some circumstances it might have been plaintiff's duty to protect her landlord from loss by subjecting herself to the same round-about process, but she also had the right to consider, to some extent at least, her own convenience secured to her by her lease, even to the extent of encountering a danger which might possibly react upon the landlord who violates it. The law will not compel her, without good reason, to abandon her front door, the full and free use of which was included in her monthly rental.

II. Soon after the plaintiff moved into the house, the defendant employed one Settlemore, whom he described as "a kind of carpenter," to fix the back porch. On November 5th Settlemore came to him with a note signed by plaintiff, reading as follows: "All
Repairing work is done all right." He thereupon gave
Back Steps. Settlemore his check for \$116.89 for his work on the back porch. Although the defendant in person produced these two papers in court and identified them, he made no suggestion that they referred to anything but the work on the back porch which amounted to that sum, yet the court, against the insistent objection of the plaintiff, permitted both papers to go to the jury. This action is one of the errors assigned and insisted on in this court.

At the time these papers were introduced, the plaintiff had testified "that on Monday, the tenth of September, 1913, when her things were being moved in by the moving man, she called up the defendant over the phone and notified him that the moving man was afraid to move her heavy things in over the front steps, and that defendant told her to go ahead, that he would fix everything up," and that the man "took her piano, etc.,

up the back stairs on account of the condition of the front steps." She also said that in December following she found out that one of the front steps was loose. This was the step on which she fell.

This is the only evidence we can find in the record connecting these two papers with the subject of this suit, or which might be urged as an excuse for their admission in evidence. Defendant stated that he employed Settlemore to put up the porch, that the amount of the check was for that service, and that Settlemore brought him the note of his own volition to obtain his pay for that work.

The admission of these two papers in evidence amounts to a judicial direction to the jury that they tend, either of themselves or in connection with some other evidence in the case, to prove that the plaintiff, on or about the fifth day of November, 1913, expressed her satisfaction with the condition of these front steps, and that the carriers to which their ends were nailed were not rotten and dangerous at the time of the accident six and a half months later. The fact that these steps were not, in September, 1913, considered strong enough to bear the weight of a piano is no evidence that they were unsafe for the plaintiff to walk upon at that time or at any later date.

Plaintiff's explanation of this note is that she gave it to a negro paper-hanger to show that he had, satisfactorily to her, completed a little job of papering in her flat.

The thing of which plaintiff now complains is that the carriers upon which these steps rested and to which they were nailed were rotten and would not hold the nails which should keep them in place, so that one end of the step gave way beneath her feet and caused her fall. This was probably true, for the defendant was on the spot with a carpenter within an hour after the injury, and repaired the damage, using the same old step in the new structure, but throwing the carriers into the scrap heap and putting in new ones.

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For the reasons we have stated we are constrained to hold that the court was in error in permitting the note and check to go to the jury as evidence pertinent to the issue before them. There is nothing in the record connecting them in any manner with that issue, while the testimony of defendant himself shows affirmatively that there was no such connection. That it was, when considered in connection with the action of the court in admitting it, highly prejudicial to the plaintiff, is evident.

III. The plaintiff testified that she had known since sometime in December, 1913, that this step was loose, and had complained to defendant about it. That he had promised to fix it and that she had tried to fix it herself, driving nails in it. That on the morning of and before the accident she had found it loose at one end, and had called the attention of Mrs. Hogan and her daughter, the mother-in-law and sister-in-law of defendant, who lived next door, to the fact by pulling out the loose end six or seven inches, and then putting it back in place.

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utory Negligence.**

Mrs. Hogan and her daughter testified that she had not only done this, but had picked up the step, and then put it back in position again.

Defendant's plea of contributory negligence being limited to plaintiff's negligence in removing the step from the position it had theretofore occupied and negligently placing it in the position in which it was at the time she fell, and afterward negligently going upon it knowing the condition in which it was at the time, he asked and the court gave his instruction number four, copied in our statement, in which the jury were told that if they believed from the evidence that on the morning of the accident plaintiff "intentionally moved the tread of the step in question with her hands, either entirely or partially from the position it occupied on the risers supporting it, and that plaintiff then undertook to place said tread in its proper position, but did so in such

manner that when she shortly thereafter passed down said steps and went upon said tread it became displaced and caused her to fall, then plaintiff is not entitled to recover." This was equivalent to a peremptory instruction to find for defendant. It requires no argument to demonstrate that this was error. It does not submit to the jury the question of negligence in meddling with the step, but assumes that if, as she testified, she moved the loose end out six or seven inches and then put it back in the position it had occupied before, or, as the Hogans testified, picked it up and showed it to them and then put it back where it was before, she committed an act of negligence and fixed her own responsibility for the injury, notwithstanding that she placed it in the same position that she found it. In other words, if she meddled with it at all, even in the interest of her own safety, the owner was released from all liability for negligence in creating a situation so dangerous that safety required its correction. This principle would lead to the conclusion that no person could recover for an injury received in an attempt to remove the trap set for him. He must first step into it.

In this case there is no evidence whatever that in meddling with the step the plaintiff contributed to any extent to the injury. She, testifying for herself, and both the Hogans, witnesses for the defendant upon that question, testified in substance that when plaintiff moved or picked up the step, she put it back as it was before. There is no evidence that it was within her power to mend it. The steps were undemised and in the possession of the owner, subject to the use of both his tenants for the purposes of egress and ingress, and this use he was bound to exercise all reasonable care to make safe, for which his compensation was included in his rental. If he negligently permitted it to become unsafe and that condition was the cause of the injury the fact that she may have attempted to repair it, or picked it up or laid it down without changing its condition, did not lessen

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the responsibility of the one charged with the duty of keeping it in a safe condition for her use.

IV. As it will be necessary to reverse and remand the cause for the errors already noticed, it may be of service in connection with further proceedings in the trial court to briefly state the rule of contributory negligence as applicable to this particular class of cases. The plaintiff was, at the time of her injuries, as tenant of the premises from month to month, entitled to use all these steps, not only for personal access to her own premises, but for the access of others having business or social relations with her which might make it necessary or desirable to her. All such persons passing in such capacity to and from her flat were, by the fact of her tenancy, entitled to reasonable care on the part of the owner of the premises with respect to such conditions of safety. She had paid her rent in advance and her title to these facilities was complete. The free and constant use of these steps was necessary to the enjoyment of her own residence, and the law does not require her to cease that enjoyment the moment the owner chooses to permit it to become dangerous. While the approach is in the possession of the owner, the easement is a part of her own premises, and the tenant may still continue to use it in the exercise of reasonable care, to be determined in view of the extent and nature of the danger created by the owner's neglect or refusal to perform his duty, and her own right of enjoyment. [Home Realty Co. v. Carius, *supra*; Looney McLean, 129 Mass. 33.] If upon due notice or with knowledge of such dangerous condition he still fails to make the necessary repairs she is not bound to vacate the premises and resort to her suit in damages for relief, but may, in the exercise of such care as is indicated by the danger, continue to use the premises if practicable to do so with reasonable safety. The landlord may not set a deadfall before the front door of his tenant, and claim exemption from damages for the consequent in-

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jury on the sole ground that he had succeeded in making it dangerous to enter or leave by that route. In such a case the jury may weigh the need of the tenant in the same balance into which the cupidity of the owner has already been cast. It is unnecessary to express any opinion on the propriety of the remaining instructions.

The judgment of the Circuit Court for the City of St. Louis is reversed and the cause remanded for further proceedings in accordance with the principles herein stated. *Ragland* and *Small, CC.*, concur.

PER CURIAM:—The foregoing opinion of BROWN, C., is adopted as the opinion of the court. All of the judges concur.

THE STATE ex rel. JOHN H. POLLOCK v. CHARLES
U. BECKER, Secretary of State.

In Banc, August 1, 1921.

1. **LEGISLATIVE ENACTMENT: Referendum: Power of Legislature to Prevent.** The General Assembly cannot prevent the reference of a legislative act to the people by referendum petition for their approval or rejection, by inserting in the act a section that the enactment is necessary for the immediate preservation of the public peace, health and safety, when it is not such in fact, nor by inserting such words in the act inhibit the court from determining whether it is subject to reference. [Per WOODSON, J.; JAMES T. BLAIR, C. J., and WALKER, GRAVES and ELDER, JJ., concurring; HIGBEE AND DAVID E. BLAIR, JJ., dissenting.]
2. **CONSTITUTIONAL PROVISION: Adopted from Another State: Interpretation Also Adopted: Exception.** The general rule, general in that it is the frequent expression of the courts, is that where a statute or constitutional provision has been borrowed from another state, which prior to its adoption in the borrowing state had received a construction by the highest court of that state, the presumption is that the borrowing state adopted it in the light of

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such construction; but this is only a rule of construction, and there are exceptions to it as ancient as the rule itself, one of which is that where the courts of the adopting state are clearly of the opinion that the construction by the courts of the initial state is erroneous, or that its application would lead to a denial of a substantial right, such foreign construction will not be controlling. [Per GRAVES, J.; BLAIR, C. J., and WALKER, J., concurring.]

3. **REFERENDUM: Ousting Justice of Peace.** A legislative act which removes eight justices of the peace in one city, cuts down the number of justices and constables and provides for the appointment of others by the Governor, is not a bill for the immediate preservation of the public peace, health or safety, nor, as is shown by current history, of which the courts take judicial notice, were they enacted for any such purpose. And it is against all reason that the reference of such acts to the people can be prevented by inserting in them a section declaring that their enactment is necessary for the immediate preservation of the public peace, health and safety. [Per GRAVES, J.; BLAIR, C. J., and WALKER, J., concurring.]
4. ———: **Exception: Exercise of Police Power: Judicial Question.** The clause of the Constitution which does not require a reference of legislative acts necessary for the immediate preservation of the public peace, health or safety is an exception to the otherwise universal reservation by the people of the power of referendum, and includes only those certain, definite and unquestioned phases of the police power which, in their very nature, may be and usually are emergent; and as the courts exercise jurisdiction to determine whether a legislative act is a valid exercise of the police power, it is also a judicial question whether a certain act, which attempts to cut off its reference to the people, is a valid exercise of the police power. [Per BLAIR, C. J.; WALKER and GRAVES, JJ., concurring.]
5. ———: **Legislative Finding: Conclusiveness.** The Constitution does not say that a legislative act shall be exempt from the referendum if the General Assembly shall declare it to be necessary for the immediate preservation of the public peace, health or safety, but the exemption is made to depend on the fact that the act is so necessary. [Per BLAIR, C. J.; WALKER and GRAVES, JJ., concurring.]
6. ———: **Exercise of Police Power: Judicial Question: Legislative Finding.** The question of fact whether a trade or calling is of such a nature as to render it subject to regulation or to particular regulations under the police power, is strictly a judicial question; and the court will hold invalid any legislative act which it finds

does not touch the public good in such a way as to justify regulation of the calling or the particular regulation attempted, and, it will do that in the face of the fact that the regulatory act involves a legislative finding that existing facts justify the attempted regulation. [Per BLAIR, C. J.; WALKER and GRAVES, JJ., concurring.]

7. ———: **Widening Police Power: Conclusiveness of Legislative Finding.** If a declaration in a legislative act that it is necessary for the immediate preservation of the public peace, health and safety is conclusive upon the courts, then the result is that Section 57 of Article IV of the Constitution empowers the Legislature to widen and extend the police power to include callings and regulations to which it could not have been extended prior to the adoption of said section, and to remove from the realm of judicial inquiry every question of fact pertaining to the scope and extent of a proper exercise of the police power; and, furthermore, it empowered the Legislature to defeat the reference of any and all bills, whether an attempted exercise of the police power or otherwise, by the mere inclusion of such a declaration in the bill, however false in fact it may be. [Per BLAIR, C. J.; WALKER and GRAVES, JJ., concurring.]
8. ———: **Legislative Error: Corrected by Another Error.** That part of said Section 57 pertaining to the reference to the people of laws enacted by the Legislature was designed to correct legislative errors; and if the Legislature errs by passing a bad act, it cannot cure that error by adding thereto another error, false on its face, that the act is necessary for the immediate preservation of the public peace, health and safety. [Per BLAIR, C. J.; WALKER and GRAVES, JJ., concurring.]
9. ———: **Legislative Finding: Effect Upon Referendum and Courts.** If a legislative declaration inserted in a law that its enactment is necessary for the immediate preservation of the public peace, health and safety is conclusive upon the question of its referendum and prevents its reference to the people, it would likewise be conclusive upon the courts when they are called upon to consider the validity of the act as a proper and reasonable exercise of the police power. It is conclusive neither on the referendum nor upon the court. [Per BLAIR, C. J.; WALKER and GRAVES, JJ., concurring.]
10. ———: **Police Regulation: Question of Fact.** Courts have power to pass upon questions of fact in determining whether police regulations are valid or invalid. [Per BLAIR, C. J.; WALKER and GRAVES, JJ., concurring.]

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11. ———: **Adopted from Oregon: Prior Construction.** The fact that the referendum provision of our Constitution was borrowed from Oregon, and that the highest court of that state had decided, before it was adopted here, that a declaration inserted by the Legislature in an act declaring that the enactment is necessary for the immediate preservation of the public peace, health and safety is conclusive upon the courts and prevents the reference of the act to the people by petitions sufficiently signed, will not compel the acceptance of such construction by the courts of this State, because it is not in harmony with the spirit and purpose of our Constitution as declared in the initiative and referendum provision, and in such case the rule of foreign construction does not apply. The construction of the borrowed constitutional provision by the courts of the initial state is not binding, but only persuasive, and will not be followed where the courts of the adopting state are clearly of the opinion, as the Supreme Court is in this case, that such construction was erroneous and if followed will result in the denial of a substantial right. [Per WALKER, J.; BLAIR C. J., and GRAVES, J., concurring.]
12. ———: **Purpose: Legislative Defeat.** The purpose of the referendum provision, expressed in an adopted constitutional amendment, was to provide an efficient method of checking and regulating legislative power, by providing that all legislative acts, except those necessary for the immediate preservation of the public peace, health and safety, may be referred to the people for their approval or rejection; and to hold that the Legislature may, in spite of the clear language used, determine, not only the extent to which the reserved power shall be used, but whether it may be exercised at all, would be to rule that the Legislature can violate the spirit of the provision and destroy its purpose. [Per WALKER, J.; BLAIR, C. J., and GRAVES, J., concurring.]
13. ———: ———: ———: **Justice of Peace: Unlimited Exceptions.** If the Legislature may except from the operation of the referendum provisions of the Constitution acts abolishing justices of the peace, clerks and constables in designated townships and providing for the appointment of their successors, by simply declaring in the acts that their enactment is necessary for the immediate preservation of the public peace, health and safety, then a like exception may be effected by inserting said declaration in any act, regardless of the absurdity of its application, and thus the constitutional power intended to be reserved will be completely destroyed. [Per WALKER, J.; BLAIR, C. J., and GRAVES, J., concurring.]
14. ———: **Justice of Peace: Public Peace, Health and Safety: Immediate Preservation: Absurdity.** Acts which apply to only one

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city in the State cannot be said to be "public" in the sense that word is used in the referendum clause of the Constitution; and if their purpose, as is apparent from their face, is to effect a change in the personnel in the offices of justices of the peace, clerks and constables in the townships of said city, and to define their duties and powers, it would be to violate reason, which is the life of the law, and to uphold an absurdity, to say they are necessary for the "immediate preservation" of the public peace, or the public health or the public safety, for those words imply an imminent danger, an impelling necessity, public disorders, and an unwholesome sanitary condition of the community at large. [Per WALKER, J.; BLAIR C. J., and GRAVES, J., concurring.]

15. ———: **Legislative Acts: Presumption of Right Action: Invasion: Judicial Interference.** Every intendment should be made in favor of the propriety of legislative action; but it is firmly fixed in American government that it is the province and duty of the judicial department to say what the law is, and that duty is more imperative under modern constitutions which do not invest exclusive legislature power in the legislature, but divide it between the legislature and the people, and place upon the court, in a proper case, the duty to determine whether the legislature's acts constitute an invasion upon the powers which the people in their Constitution have reserved to themselves. If a legislative act purports to be for the preservation of the public peace, health and safety, and its words and subject-matter have no relation to those subjects, and an analysis of it demonstrates that it is a palpable invasion of the powers reserved by the people, the courts will so decide, and preserve the constitutional right of referendum. [Per WALKER, J.; BLAIR, C. J., and GRAVES, J., concurring.]
16. ———: **Peace and Safety: Legislative Determination.** The mandate of the Constitution, coming directly from the people, is superior to the will of the Legislature; and while the Legislature, being invested with law-making power, must, in the first instance, decide whether an act is necessary for the immediate preservation of the public peace, health or safety, its determination that the necessity exists if in fact without substantial basis, is not final or conclusive. But if the act purports to have been adapted to meet an emergency which palpably, from its face, does not exist, it becomes the duty of the courts to take jurisdiction and give effect to the constitutional intent and purpose. [Per ELDER, J.; BLAIR, C. J., and WALKER, and GRAVES, JJ., concurring.]
17. ———: ———: ———: **Construction by Oregon Court.** The ruling of the Supreme Court of Oregon, from which the initiative and referendum section of our Constitution was borrowed, that a decla-

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ration placed in a bill by the Legislature that its enactment is necessary for the immediate preservation of the public peace, health and safety is conclusive, is not binding upon the Supreme Court of this State, although such ruling was made before the constitutional section was adopted in this State. While such foreign construction is persuasive and entitled to respectful consideration, it is not binding, and will not be followed if the courts of the adopting state are of the opinion that it is erroneous. [Per ELDER, J.; BLAIR, C. J., and WALKER and GRAVES, JJ., concurring.]

18. ———: ———: ———: **Removal of Justice of Peace.** A declaration in a legislative act, abolishing in one township the offices of eight justices of the peace and constables, who from the record are presumed to be properly and efficiently discharging their official duties, and providing for the immediate appointment of other justices and constables, that its enactment is necessary for the immediate preservation of the public peace, health and safety, is not conclusive on the courts, and is not sufficient to prevent the reference of said act to the people for their approval or rejection. [Per ELDER, J.; BLAIR, C. J., and WALKER and GRAVES, JJ., concurring.]
19. ———: ———: ———: **Construction by Oregon Court: Binding.** When the people of Missouri adopted the referendum amendment from the Constitution of Oregon they adopted the construction which had previously been given it by the Supreme Court of that state just the same as if that construction had been written into the body of the amendment; and that court having ruled, prior to the adoption of the amendment in this State, that a declaration written into the body of a legislative act that its enactment is necessary for the immediate preservation of the public peace, health and safety is conclusive and final on the question of necessity, such ruling is binding on the courts of this State and compel a like ruling from them. [Per HIGBEE, J., dissenting.]
20. ———: ———: ———: **Legislative Power: Coordinate and Independent Department.** The Constitution has solemnly vested the legislative power in the General Assembly, which is an independent and co-ordinate department of the government, answerable only to the people for the execution of the powers delegated to it, and the remedy for any abuse of that power, by fraud or trickery, is the ballot. Besides, a legislative act, which contains a section declaring that its enactment is necessary for the immediate preservation of the public peace, health and safety, may be submitted to the direct vote of the people by an initiative petition, so that there is no foundation for the suggestion that the Legislature, by inserting such a declaration in an act, may, by fraud and trickery, destroy the

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referendum or prevent legislation by the people. [Per HIGBEE, J., dissenting.]

21. ———: ———: ———: **Oregon Construction.** When one state borrows a constitutional provision from another and the highest court of that state has authoritatively construed the provision prior to its adoption by such other, such provision is to be held as having been adopted with the construction thus previously put upon it. The initiative and referendum amendment to the Missouri Constitution was borrowed from the Constitution of Oregon, and the decision of the Supreme Court of that State, made before its adoption here, that a declaration in an act of the Legislature that its enactment is necessary for the immediate preservation of the public peace, health and safety is final and conclusive on the court, if not absolutely binding on the Supreme Court of Missouri, is persuasive authority of the highest character. [Per DAVID E. BLAIR, J., dissenting.]
22. ———: ———: ———: **Weight of Authority: On Principle.** The decided weight of authority is to the effect that the existence of the necessity for a legislative act is a matter of legislative determination. But independent of decided cases, and on principle, the courts are and should be bound by the declaration in an act passed by the Legislature that its enactment is necessary for the immediate preservation of the public peace, health and safety. [Per DAVID E. BLAIR, J., dissenting.]

Mandamus.

WRIT GRANTED.

John T. Barker and John M. Atkinson for relator.

The Secretary of State refused to accept these referendum petitions for the sole reason that Senate Bills Nos. 4, 5, 6, and 7 contained the "peace, health and safety clause." Relator contends that this action was arbitrary, and that this court must determine from the entire bills whether the peace, health and safety is involved. State ex rel. v. Sullivan, 224 S. W. 327; State ex rel. v. Roach, 230 Mo. 435; State ex rel. v. Meath, 84 Wash. 302; In Re Hoffman, 155 Cal. 114; McClure v. Nye, 22 Cal. App. 248; Rigdon v. San Diego, 30 Cal. App. 107; Riley v. Carico, 27 Okla. 33; Beal v. State, 103 Atl. (Mary-

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land), 99; Attorney-General v. Lindsay, 178 Mich. 524; Simpson v. Gage, 195 Mich. 581; Payne v. Graham, 7 A. L. R. 516; Strange v. Levy, 107 Atl. (Maryland), 549; County v. Dayton, 92 Ohio St. 215; State ex rel. v. Whisman, 36 S. D. 260, L. R. A. 1917B, 1; Case v. Howell, 85 Wash. 281, 147 Pac. 1162; State ex rel. v. Wright, 251 Mo. 341; Mugler v. Kansas, 123 U. S. 623; O'Neil v. Amusement Co., 8 A. L. R. 1600; In re Jacobs, 98 N. Y. 981, 50 Am. Rep. 636.

Jesse W. Barrett, Attorney-General, *Merrill E. Otis* and *Albert Miller*, Assistant Attorneys-General, for respondent.

(1) The initiative and referendum provision in the Constitution, Section 57 of Article IV, was taken bodily from the Constitution of Oregon. State ex rel. v. Carter, 257 Mo. 68, 70; State ex rel. v. Sullivan, 224 S. W. 334.

(2) The initiative and referendum amendment was adopted in Missouri at the November election in 1908. More than four years before, to-wit, on January 11, 1904, the Supreme Court of Oregon, in the case of Kadderly v. Portland, 44 Ore. 118, 75 Pac. 222, construed the Oregon provision as authorizing the Legislature finally and conclusively to determine whether a given act is necessary for the immediate preservation of the public peace, health and safety. Missouri, having taken its amendment from Oregon, took it with that interpretation, and that interpretation is now binding upon the Supreme Court of Missouri. State ex rel. v. Sullivan, 224 S. W. 342; State ex rel. v. Sullivan, 224 S. W. 334; State ex rel. v. Carter, 257 Mo. 69; State ex rel. v. Miles, 210 Mo. 146; Skouten v. Wood, 57 Mo. 380; Skrainka v. Allen, 76 Mo. 389; Knight v. Rawlings, 205 Mo. 433. (3) Under a constitutional provision excepting from the referendum laws necessary to the immediate preservation of the public peace, health or safety, it is for the Legislature to say what laws come within the exception, and its decision is final and conclusive.

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Kadderly v. Portland, 44 Ore. 118, 75 Pac. 222; State ex rel. v. Bacon, 14 S. D. 394, 85 N. W. 225; Oklahoma City v. Shields, 22 Okla. 265, 100 Pac. 559; In re Menefee, 22 Okla. 365, 97 Pac. 1014; Arkansas Tax Commission v. Moore, 103 Ark. 48, 145 S. W. 199; Hanson v. Hodges, 109 Ark. 479, 160 S. W. 392; Van Kleek v. Ramer, 62 Colo. 4, 156 Pac. 1108; In re Senate Resolution, 54 Colo. 262, 130 Pac. 333; People ex rel. v. Ramer, 61 Colo. 422, 158 Pac. 146. (4) Whether an act is necessary for the preservation of the public peace, health and safety is a question of fact. The finding by the Legislature as to questions of fact is not subject to judicial review. State ex rel. v. Hackman, 275 Mo. 646; Ex parte Renfrow, 112 Mo. 591, 594. (5) Even if it should be held that the legislative finding is not conclusive, nevertheless it should be conclusive in all cases of doubt. Attorney-General v. Lindsay, 178 Mich. 524; State ex rel. v. Howell, 85 Wash. 281. (6) The phrase "immediate preservation" in the referendum provision refers merely to those laws which will be necessary before the time when the people under the referendum would have time to vote upon them. Hanson v. Hodges, 160 S. W. (Ark.) 392, 396. (7) The laws involved in this case are, as a matter of fact, necessary to the immediate preservation of the public peace, health and safety.

Wilbur F. Spottswood for amicus curiae.

(1) The Constitution (Secs. 1 and 57, Article IV), in vesting legislative power in the General Assembly, reserved to the people the right to subject to popular vote all laws, except certain classes of laws, among them the class of laws "necessary for the immediate preservation of the public peace, health or safety." (2) It is conceded that, to bring the law, now under consideration, within the exception, exempting certain classes of laws from the referendum, it must appear that it belongs to a class of laws which are necessary either for the imme-

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mediate preservation of the public peace or for the immediate preservation of the public health, or for the immediate preservation of the public safety. (3) From its very nature the law in question belongs to the class of laws which are necessary for the preservation of all these public blessings. It creates a court of justice having a certain measure both of civil and criminal jurisdiction, including jurisdiction in cases of nuisance; and civilization knows of no scheme by which it can dispense with its courts as instruments for the accomplishment of those ends. Such laws are absolutely necessary. (4) And not only is the law in question necessary for the preservation of the peace, health, and safety of the people, but it is immediately necessary for their preservation, since the menace to the peace, health and safety of the community, against which society, through its courts, raises the shield and unsheaths the sword, is always present, always immediate, always instant. Not for a moment can an efficient judicial system be dispensed with, if the public peace, health and safety are to be preserved. (5) Some have supposed that the court can consider previously existing conditions and previously existing laws, in order to determine whether the act now before the court is necessary; but it is submitted that such a conception is entirely erroneous. Were the court to go into such matters, it would, for the time being, lay aside its judicial character, and become, for the nonce, a legislative body. Its judgment would be forged in the heat of parliamentary debate, and would rest upon conceptions, not of what the law was, but upon conceptions of what the law ought to be. In short, we would have an exhibition of the exercise by the judicial branch of a function wholly legislative, contrary to the entire scheme of government embodied in the Constitution. (6) What Section 57 of Article IV of the Constitution does, is, not to provide that particular laws, made necessary by particular conditions, shall be excepted from the referendum, but that certain classes of laws shall be so excepted; and the only function of the court

is, to determine whether the law, from its nature, falls within one of those classes. That this law does fall within the class of laws necessary for the immediate preservation of the public peace, the public health and the public safety, we have already shown.

WOODSON, J.—This is an original proceeding by mandamus instituted in this court by the relator against the respondent, the Secretary of State, seeking to compel him to accept and file four certain referendum petitions, hereinafter to be more fully described, so that the laws mentioned in the petitions may be placed upon the ballots at the next general election of the State for confirmation or rejection by the voters of the State.

The pleadings in the case fully and clearly present the legal proposition presented to this court for determination and for that reason I shall here present them in full. They are as follows:

PETITION.

“This action was brought in the name of the State of Missouri at the relation of John H. Pollock against Charles U. Becker, Secretary of State. The petition, which was filed in this court on the 18th day of June, 1921, alleges that the relator is a resident and citizen of Kansas City, Jackson County, Missouri, and a legal voter and qualified elector in said city, county and State, and at the November election in 1918 was elected justice of the peace within and for Kaw Township in said county and State for a term of four years, and that the respondent Becker is now the duly elected and acting Secretary of State of the State of Missouri; that the 51st General Assembly convened at Jefferson City, January 1, 1921, and adjourned *sine die* on March 21, 1921, and passed, among others, Senate Bill No. 4, entitled, ‘An Act to amend Section 2688 of the Revised Statutes of Missouri, 1919, relating to Justices of the Peace, abolishing the offices of Justices of the Peace, elected in dis-

tricts and certain townships and providing for the transfer of business pending before such Justices;' and Senate Bill No. 5, entitled, 'An Act repealing Article 9 including Sections 2923 to 2943 inclusive, Chapter 22 of the Revised Statutes of Missouri, 1919, entitled "'Justices and constables in townships of two hundred thousand and less than four hundred thousand"'—and making a new article in lieu thereof;' and Senator Bill No. 6 entitled, 'An Act to amend Section 2689 of the Revised Statutes of Missouri, 1919, relating to Justices of the Peace;' and Senate Bill No. 7, entitled, 'An Act amending Section 2143 of the Revised Statutes of Missouri, 1919, relating to constables, abolishing the office of constable in districts, in certain townships, and providing for constables in such townships;' that all four of said bills have a common interest and pertain to the same subject and affect the same parties, that is, said bills abolish the offices of eight justices of the peace and all constables and clerks in Kaw Township, Jackson County, Missouri; Senate Bill No. 4 provides that on the 1st day of July, 1921, the offices of the justices of the peace elected or appointed in districts in all municipal townships containing a city of one hundred thousand inhabitants and less than three hundred thousand inhabitants and the office of clerks to such justices shall be abolished and all jurisdiction and powers vested in such justices of the peace are vested in other justices of the peace provided for in said bill; Senate Bill No. 5 provides for the election of five justices of the peace in such township at the general election in 1922, and provides that until such election the Governor shall appoint and confer jurisdiction upon such new justices of the peace to make certain rules, etc.; Senate Bill No. 6 provides for the appointment of other justices of the peace by the County Court of Jackson County; Senate Bill No. 7 abolishes all of the constables holding office after the first day of July, 1921 in said Kaw Township, Jackson County, Missouri, and provides for the election of new constables at the general election in 1922 and authorizes the Governor to appoint until such general election.

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“The petition of relator further alleges that all of said bills were approved by the Governor of Missouri on the 11th day of March, 1921, and that on the 18th day of June, 1921, and within ninety days after the adjournment of the Fifty-first General Assembly, the relator presented to the Secretary of State in the presence of the Governor, 1538 legal referendum petitions containing the total of 65,248 names of legal voters and qualified electors of the State of Missouri, which petitions were legally signed by more than five per cent of the legal voters and qualified electors in more than two-thirds of the Congressional districts of the State of Missouri, asking for a referendum on all four of said Senate Bills in order that the people might at the general election in 1922 vote for the approval or rejection of said measures; that said Secretary of State, wholly disregarding his duties and without any legal right or authority, refused to accept, receive and file said referendum petitions against said bills and assigned as his sole and only reason for such refusal that said bills were not referable, because each of the bills contained among other provisions the following language:

“This enactment is hereby declared to be necessary for the immediate preservation of the public peace, health and safety within the meaning of Section 57, Article 4, of the Constitution of Missouri.”

“The petition further alleges that it is not true that said bills, or either of them, are necessary for the immediate preservation of the public peace, health or safety within the meaning of Section 57 of Article 4 of the Constitution of Missouri, but that said bills are purely local in their character and pertain to Jackson County, Missouri, only, and that such statements contained in said bills are false and untrue and that such an attempt on the part of the Legislature to prevent said bills from being referred to the people is unconstitutional and void and in violation of Section 57 of Article 4 of the Constitution of Missouri, and that such action on the part of the Secretary of State was and is arbitrary

and unfair; that by the refusal of the respondent to accept, receive and file such referendum petitions, the relator and all other citizens of Missouri have suffered and will suffer irreparable wrong and injury and the people of the State will be denied their constitutional right to vote for the approval or rejection of said measures and will be entirely without redress of said wrongs, without the interposition and interference of this court by its writ of mandamus.

"The prayer of the petition prays this court to issue its writ of mandamus, directing and commanding respondent, as Secretary of State, to forthwith accept, receive and file in his office at Jefferson City, Missouri, all of the said referendum petitions pertaining to said Senate Bills Nos. 4, 5, 6, and 7, and to detach the sheet containing the signatures and affidavits and cause them to be attached to one or more printed copies of the measures so proposed, and to deliver such detached copies of such measures to the relator, and that the respondent be compelled to forthwith transmit to the Attorney-General of the State of Missouri a copy thereof in order that said Attorney-General shall provide and return to the Secretary of State a ballot title for said measures, and that said respondent be compelled to furnish to each of the county clerks of the State of Missouri a certified copy of the ballot title and numbers of the several measures to be voted upon at the coming general election, and for such other relief as may be found necessary and expedient to cause the respondent to do that which in justice and right ought to be done.

"After the filing of the petition in this court, relator and respondent entered into a stipulation agreeing that the petition might stand for the alternative writ; that the respondent have until the 28th day of June, 1921, within which to plead; that the cause be submitted to the court upon briefs filed by both parties; that relator have until the 5th day of July, 1921, to file his brief and that respondent have five days thereafter to file his answer brief, and that relator have three days

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thereafter if desired to file reply brief; and that Senate Bills Nos. 4, 5, 6, and 7, be consolidated in one action and all questions as to joinder be waived."

ANSWER.

"On the 28th day of June, 1921, respondent filed his answer to said petition of mandamus and in said answer says:

"Admits that relator is a resident and assessed tax-paying citizen of Kansas City, Jackson County, Missouri, and is a legal voter and qualified elector in said city, county and state, and was on the second day of November, 1918, elected a justice of the peace within and for Kaw Township, Jackson County, Missouri, for a term of four years; admits that respondent is and has been the Secretary of State of Missouri since the 10th day of January, 1921; admits that Fifty-first General Assembly of Missouri convened at Jefferson City on January 5, 1921, and adjourned *sine die* on the 21st day of March, 1921, and passed, among other acts, Senate Bills Nos. 4, 5, 6, and 7, with the titles as pleaded; alleges that copies of said Senate Bills Nos. 4, 5, 6, and 7, are attached and marked 'Exhibits A, B, C and D,' and made a part thereof; admits that all four of said bills have a community of interest, that is, said bills are similar, affect the same parties, pertain to the same subject, are companion bills, and one is useless without all; admits that all of said bills were approved by the Governor on the 11th day of March, 1921, and that on the 18th day of June, 1921, in the office of the Secretary of State and in the presence of respondent and the Governor of Missouri, relator presented as against each of said bills 1538 referendum petitions containing a total of 65,248 names of legal voters and qualified electors of the State of Missouri, which said petitions were legally signed by more than five per cent of the legal voters and qualified electors in each of two-thirds of the Congressional districts of the State of Missouri as set out in detail in relator's petition; admits that said petitions were presented in

order that said Senate Bills Nos. 4, 5, 6, and 7, might be referred to the people of Missouri for their approval or rejection; admits that at the time said referendum petitions were presented, relator demanded respondent to accept, receive and file said petitions against each of said bills and to detach the sheets containing the signatures and affidavits as alleged in relator's petition, and demanded that respondent forthwith transmit to the Attorney-General of the State of Missouri a copy thereof in order that he might provide a ballot title for each of said measures, and demanded that respondent furnish to each of the county clerks of the State of Missouri a certified copy of the ballot titles and numbers of the several measures to be voted upon at the coming general election, and demanded that respondent fully comply with Chapter 47 of the Revised Statutes of Missouri 1919, and other laws appertaining to the referendum acts of the Legislature; and admits that respondent refused to accept, receive and file said referendum petitions against each and all of said bills; denies that in refusing to accept, receive and file said petitions, respondent wholly disregarded his duties as Secretary of State; admits that each of said bills contained among other provisions, the following language:

“ ‘This enactment is hereby declared necessary for the immediate preservation of the public peace, health and safety, within the meaning of Section 57 of Article 4 of the Constitution of Missouri.’

‘Denies that it is not true that said bills, or either of them, are necessary for the immediate preservation of the public peace, health and safety within the meaning of Section 57 of Article 4 of the Constitution of Missouri; denies that said bills, and each of them are purely local in their character and pertain to Jackson County only and do not affect the citizenship of Missouri in any particular; denies that the statement contained in each of said bills is false and untrue, and denies that such statement does not prevent said bills from being referred to the people for their approval or rejection, and that

the action of the Legislature in inserting said statements in said bills was unconstitutional and void and in violation of Section 57 of Article 4 of the Constitution of Missouri; and denies that the action of respondent, as Secretary of State, was and is arbitrary, unfair and in violation of Section 57 of Article 4 of the Constitution of Missouri, or with any other provision of the Constitution; denies that by his refusal to accept, receive and file such referendum petitions the relator and other citizens of Missouri have suffered, and will suffer, irreparable wrong and injury and the people of the State be denied any constitutional right whatsoever by reason of his said action; denies each and every allegation contained in relator's petition and alternative writ of mandamus not herein expressly admitted; further answering, respondent states that he refused, and still refuses, to accept, receive and file the referendum petitions tendered by the relator for the following reasons:

"1. That said Senate Bills Nos. 4, 5, 6 and 7, and each of them, contain the following language:

" 'This enactment is hereby declared to be necessary for the immediate preservation of the public peace, health and safety, within the meaning of Section 57, of Article 4, of the Constitution of Missouri.'

"Alleges that by reason of said legislative declaration contained in each of said bills and by reason of the provisions of Section 57 of Article 4 of the Constitution of Missouri, said bills are not subject to, but are excepted from, the referendum.

"2. That said bills, and each of them, are necessary for the immediate preservation of the public peace, health and safety, and that, therefore, by the provisions of Section 57 of Article 4 of the Constitution of Missouri, said bills are not subject to the referendum; and alleges that, having made return fully to the relator's petition and the alternative writ of mandamus herein, respondent prays the court that the peremptory writ of mandamus prayed for by relator be denied."

REPLY.

"On the 30th day of June, 1921, relator filed his reply to the answer of the respondent as follows:

"Admits that said Senate Bills Nos. 4, 5, 6 and 7, and each of them, contained the following language:

" 'This enactment is hereby declared to be necessary for the immediate preservation of the public peace, health and safety within the meaning of Section 57 of Article 4 of the Constitution of Missouri.'

"Denies that by reason of said legislative declaration contained in each of said bills and by reason of the provisions of Section 57 of Article 4 of the Constitution of Missouri, said bills are not subject to, but are excepted from, the referendum; denies that said bills, and each of them, are necessary for the immediate preservation of the public peace, health and safety, and therefore, by the provisions of Section 57 of Article 4 of the Constitution of Missouri, said bills are not subject to the referendum; further alleges that said statement in each of said bills is false and untrue and in violation of Section 57 of Article 4 of the Constitution of Missouri and that said bills are not excepted from the referendum by reason of said statement; and further alleges that it is not true that said bills, or either of them, are necessary for the immediate preservation of the public peace, health and safety and alleges that said bills are purely local in their character and simply provide for legislating out of office eight justices of the peace and eight constables in one township (Kaw) in the entire State of Missouri, and that the bills are not in any sense necessary for the immediate preservation of the public peace, health and safety.

"We submit, therefore, that there is simply one question for this court to determine and that is whether or not the adoption by the Legislature of the 'peace, health and safety clause' excepts these bills from the referendum. That is, may a Legislature select only one township in the entire State of Missouri and legislate

out of office eight justices of the peace and constables who have been elected for a four-year term and authorize the Governor to appoint their successors until the next general election? By stipulation filed and the pleadings, all other questions are eliminated, and the court is called upon to determine the one legal question involved."

There is but a single legal proposition presented by this record to this court for determination, and that is, has the Legislature of the State the constitutional authority under Section 57 of Article 4 of the Constitution to enact a law, and debar the power of the courts of the State from passing upon the question as to whether or not the law is subject to referendum by adding thereto the words: "This enactment is hereby declared to be necessary for the immediate preservation of the public peace, health, and safety, within the meaning of Section 57 of Article 4 of the Constitution of Missouri?" Said section, in so far as here necessary, reads as follows:

"The legislative authority of the State shall be vested in a legislative assembly, consisting of a senate and house of representatives, but the people reserve to themselves power to propose laws and amendments to the Constitution, and to enact or reject the same at the polls, independent of the legislative assembly, and also reserve power at their own option to approve or reject at the polls any act of the legislative assembly. The first power reserved by the people is the initiative, and not more than eight per cent of the legal voters in each of at least two-thirds of the Congressional districts in the State shall be required to propose any measure by such petition and every such petition shall include the full text of the measure so proposed. Initiative petitions shall be filed with the Secretary of State not less than four months before the election at which they are to be voted upon. The second power is the referendum, and it may be ordered (except as to laws necessary for the immediate preservation of the public peace, health or safety and laws making appropriations for the current expenses

of the State government, for the maintenance of the State institutions and for the support of public schools) either by the petitions signed by five per cent of the legal voters in each of at least two-thirds of the Congressional districts in the State, or by the legislative assembly, as other bills are enacted."

This question has been most elaborately and ably discussed by counsel for the respective parties, and all the authorities bearing upon the question from the various states of the Union have been cited, and after a thorough consideration of the same, I am fully satisfied that the law of the case was, and is, fully and correctly declared by GRAVES, J., in the case of *State ex rel. v. Sullivan*, 283 Mo. 547, 224 S. W. 327, where the same legal proposition was presented to this court for determination that is here presented by this case. I fully concurred in the views as there expressed by Judge GRAVES, and adopt them as my views of the law of this case. While that opinion was not concurred in by a unanimous opinion of the court, yet there was but one dissent as to the law as there expressed regarding the question here presented; Judges WILLIAMSON, GOODE, BLAIR, and WILLIAMS concurred as to paragraphs 1, 2, 3, 4, 6 and the result of the GRAVES opinion, but they expressed no opinion as to Paragraph 5.

For the reasons stated, I am of the opinion that the writ of mandamus should be made permanent. It is so ordered. *James T. Blair, C. J., Graves, Walker and Elder, JJ.*, concur in separate opinions; *Higbee and David E. Blair, JJ.*, dissent in separate opinions.

GRAVES, J. (concurring).—I concur in the law announced by our brother WOODSON in this case. He adopts what the writer said in Paragraph Five of the opinion in the case of *State ex rel. Westhues et al. v. Sullivan*, 283 Mo. l. c. 584, et seq. We there ruled, upon what appeared to us to be the weight of authority and the very reason of the matter, that the Legislature, under Section 57 of Article IV of our Constitution, could not close judicial

determination as to the real character of any law by saying that such law was "necessary for the immediate preservation of the public peace, health or safety" of the State. We further said that this court could examine the face of the legislative act, and if in fact it was not for "the *immediate* preservation of the public peace, health or safety" of the State, we could and would declare the legislative declaration to the effect that it was "necessary for the immediate preservation of the public peace, health or safety" of the State, void, and of no effect, as being in conflict with said constitutional provision, and the spirit thereof. We shall not reargue this naked principle of law which our brother has adopted as his views. Nor would we write at all in this case, but for the fact that our learned associate has not discussed the character of the legislative acts before as at this time. He sets out an outline of them, and ordinarily this would, or should suffice. In this record we find that learned counsel for respondent insist (1) that we borrowed our constitutional provision from Oregon, and are bound by the construction which the Supreme Court of that State placed upon it before our adoption, and (2) that the laws here involved are in fact necessary for the "immediate preservation of the peace, health or safety" of Missouri. The questions are seriously presented and should be seriously considered. In their order we shall consider them, and such other contentions as may require notice.

I. It has been suggested that the views of the writer, expressed in Paragraph Five of the opinion in State ex rel. Westhues v. Sullivan, 283 Mo. l. c. 584, was *obiter* and was only interesting "in view of the fact that the question might arise *in futuro*." It is true that a majority of my brothers were of opinion that such case was decided before reaching that question, but counsel, on both sides, conceived the question to be thoroughly in the case, and on that theory briefed and vehemently argued it. What was written was in response to that insistence,

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and it was written after full investigation, not only of all the cases cited, but of all that could be found. It was written in exact coolness and deliberation, and far from a battle line, such as surrounds the instant case. But even *obiter* may express good law, and we think this alleged *obiter* does express the law, as well as the common sense of the question.

II. The general rule is that where a statute or a constitutional provision is borrowed from another State, and has received a construction in the initial state by the highest court of that state, the presumption is that the borrowing state adopted it in the light of such construction. This, however, is only a rule of statutory construction, and the exceptions to the rule are as ancient as the rule itself. When we say "general rule" above, we mean that such is the frequent expressions of the courts. This court has often given similar expressions, where the question was under consideration. We have likewise given expression as to the exceptions. Nowhere are these exceptions more concisely stated than in 25 R. C. L. 1073, whereat it is said:

Adopted Constitutional Provision.

"The general rule just stated as to the construction of adopted statutes is by no means absolute, or imperative on the courts of the adopting state, but is subject to numerous exceptions. The rule that the adoption of a foreign statute carries with it the prior construction in the originating state has been held to be applicable only where the terms of the statute are of doubtful import so as to require construction. So the rule has been declared to be inapplicable where radical or material changes are made in the statute; where the statute had been materially changed by amendment, after the decisions construing it and before adoption; where the foreign construction is not in harmony with the constitution of the adopting state, or is contrary to the spirit and policy of the jurisprudence of the adopting state; or where the courts of the adopting state are clearly of the opinion

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that the foreign construction is erroneous, or that its application would lead to a denial of a substantial right."

To like effect is 36 Cyc. 1154-5: "Where the Legislature enacts a provision taken from a statute of another state or country, in which the language of the act has received a settled construction, it is presumed to have intended that such provision should be understood and applied in accordance with that construction. This rule of construction, however, while recognized by all the courts, is subject to a number of limitations. The construction placed upon the statute by courts of the state from which it was adopted is regarded as persuasive, and indeed as entitled to very great weight, with the courts of the adopting state, but not as conclusive; and it will not be applied where it would be inconsistent with the Constitution of the adopting state, or contrary to the spirit and policy of its laws, *or is regarded as unsound in principle and against the weight of authority.*"

In each of the foregoing quotations the italics are ours. Under the rule the court's interpretation to be considered is the interpretation given before the adoption. It could not be otherwise, because there could be no presumption that a given construction had been adopted, with the adoption of the statute, unless the construction preceded the adoption. The cases all so hold, and had to so hold by the very reason of the thing. In the early case of *Pratt v. Miller*, 109 Mo. 78, this court, through BRACE, J., found that we had borrowed an English statute, which had been previously construed in a given way—not once, but several times—before our adoption. This court refused to follow those constructions, because not consonant with the better reasoning of later cases. Some states do not recognize the rule at all, because a statute transplanted from one state system of laws to another state system of laws must be made to harmonize with the latter rather than the former. Many states hold that the previous construction is very persuasive, but not binding. The

cases can be gathered from the texts and notes thereunder which we have cited, *supra*.

The exception to the rule uppermost in our mind is that expressed in the terms "or where the courts of the adopting state are clearly of the opinion that the foreign construction is erroneous, or that its application would lead to a denial of a substantial right." The Kadderly case from Oregon does not announce sound doctrine. The Washington court repudiated it, and their constitutional provision was not adopted until four years after ours, and long after the Kadderly case. Our Constitution provides both for a legislative referendum, and a referendum by the people. It is absolutely against all reason to rule that the Legislature can, by trick and chicanery, through a declaration against the very face of the bill, cut the people off from the constitutional rights to refer all measures, and yet retain the legislative right. In what we ruled in Sullivan's case we had in mind all rules of statutory construction, as well as all exceptions to such rules. We have recognized the exceptions before (109 Mo. 78, *supra*) and but exercise the same privilege in that case. As said there, to hold that the Legislature could by the use of a declaration to the effect that the given bill was "necessary for the immediate peace, health or safety" of the State, when in fact the bill itself showed no emergency would be to destroy the constitutional provision. Neither court nor Legislature should so construe a Constitution as to make it self-destructive. But after all, the section of the bill making this declaration of great emergency must be construed with all the other provisions of the bill, and if when so construed by a court, it fails to measure up to the spirit of the Constitution, it must fail. We said enough in Sullivan's Case, and will not further reiterate.

III. Of these bills, which change in a way the system of justices courts in Jackson County, and cut down the number of such courts, and the number of the const-

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bles thereof, it is urged that they really go to the *immediate* preservation of the peace, health and safety of the great State of Missouri. Courts are not supposed to be blinded bats. Of current history courts take judicial knowledge. What all know, the courts must judicially know. The current history shows the real purpose of these laws, and we need not state that history. It is known to every member of the Legislature, every judicial officer of the State, and every lawyer and citizen, who has read and kept abreast with the current history, made and now being made. To say that the purpose of these bills was to protect Missouri in some great, impending emergency relative to her peace, health or safety, is not only in the face of the bills themselves, but in the face of what her citizens know. We need not go further. *James T. Blair, C. J., and Walker, J., concur.*

JAMES T. BLAIR, C. J. (concurring).—Section 57 of Article IV of the Constitution provides, among other things:

“The legislative authority of the State shall be vested in a legislative assembly, consisting of a senate and house of representatives, but the people reserve to themselves power to propose laws and amendments to the Constitution, and to enact or reject the same at the polls, independent of the legislative assembly, and also reserve the power at their own option to approve or reject at the polls any act of the legislative assembly. The first power reserved by the people is the initiative. . . . The second power is the referendum, and it may be ordered (except as to laws necessary for the immediate preservation of the public peace, health or safety and laws making appropriations for the current expenses of the state government, for the maintenance of the state institutions and for the support of the public schools) either” by petitions, etc.

At its regular session in 1921 the General Assembly passed certain acts which were intended to make changes in the system of justice of the peace courts in Kansas

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City. Appended to one or more of these acts is the following: "*Emergency*.—This enactment is hereby declared to be necessary for the immediate preservation of the public peace, health and safety within the meaning of Section 57, Article 4, of the Constitution of Missouri." No emergency clause under Section 36 of Article 4 was attached or passed, but the principal bill contains a clause to the effect that it "shall become effective" July 1, 1921. Properly drawn petitions for the reference of these, signed by the requisite number of voters who possess the required qualifications, have been tendered to respondent for filing. He refused to file them because of the inclusion in the acts of the section which has been set out. This suit is brought to compel the filing of the petitions and the reference of the acts.

I. It is urged that the inclusion in the acts of the clause that the "enactment is hereby declared to be necessary for the immediate preservation of the public peace, health and safety" is conclusive upon the question of fact whether the act is so necessary. Upon this question much has been said in the briefs, and in opinions prepared by my brethren, and much can be found in the decisions they cite. Both sides of the argument are presented with vigor and learning. There is little that can be added. A few rather general observations may not be out of place.

(1) In the circumstances the remarks of a learned annotator can properly be given place so that a general view of the question may be had at the outset.

Legislative Finding. In the copious note to the decision in *Hockett v. Licensing Board*, 91 Ohio St. 176, 110 N. E. 485, which is found in 1917 B., L. R. A. (N. S.), at page 15 there appears (pp. 27-28) the following:

"According to the other line of authorities the legislative determination is not conclusive. The latter conclusion, that the legislative determination to declare an

emergency is not final, seems to be the correct one. The limitation upon the power of the Legislature to declare an emergency that only laws of a certain class shall be so subject, or that all laws except the class shall be subject to the referendum, without expressly vesting in the Legislature power to determine what laws come within that class, leaves to the courts the power to determine the question. In other words, a law must be a law belonging to the excepted class before it can be declared free from the referendum. Where the law is of the prescribed character the legislative determination that it shall be free from the referendum is final; but its determination that the law belongs to the excepted class is not. In support of this theory it has been pointed out that the clause excepting the named laws from the referendum is not the usual general emergency provision, but an exception to the otherwise universal application of the reserved power of referendum; that the clear purpose of the exception is to preserve unimpaired the right of the Legislature to exercise the police power so far as it may be emergent; that the exception from the referendum includes only those certain, definite and unquestioned phases of the police power which, in their very nature, may be and usually are emergent. It is further stated, that, as the court exercises jurisdiction to determine whether an act of the Legislature is a valid exercise of the police power, it must be a judicial question whether the exercise by the Legislature of certain phrases of that power which are selected and made an exception to the constitutional guaranty of the referendum is a valid exercise of the power."

(2) Section 57 of Article IV of the Constitution does not provide that an act of the Legislative Assembly shall be exempt from the referendum if the Assembly shall declare it to be "necessary for the immediate preservation of the public peace, health or safety." On the contrary, the exemption is made to depend upon the *fact* that the act is so necessary. This, of course, is not and cannot be

Finality of
Legislative
Finding.

disputed. The argument is not that the Constitution provides in terms that the legislative finding shall be conclusive. The argument is, in substance, that the effect of such a legislative finding of fact is final and conclusive on the courts in the very nature of the case.

(3) If respondent is right in the position he takes on this question, i. e., that the inclusion of the peace, health and safety clause in the acts now in question, is conclusive on the question of fact whether the acts are necessary for the immediate preservation of the public peace, health and safety and bars all investigation of that question by the courts, it cannot be denied that the same thing must be true as to all acts in which that clause has been or may hereafter be included. If it is final as to one, it must be so as to all. Neither the language of Section 57, nor the character of the rule contended for, will admit of a classification of legislative acts with respect to the question of the finality of the legislative finding upon the question of exemptability from the referendum on the ground of necessity for the immediate preservation of the public peace, health and safety. It is final in the case of every act, or it is final, in the sense contended for by respondent, with respect to none. This does not seem to be denied.

(4) If, as just pointed out, respondent's proposition must be true as to all acts in which the peace, health or safety clause is incorporated, if true as to any, then it is proper in the light of this, to examine the result of upholding respondent's contention. If the peace, health or safety clause can be employed by a majority of the Legislative Assembly to exempt all acts (not otherwise exempted) from the referendum, then it may be employed to exempt laws passed in the exercise of the police power or pursuant to an attempt to exercise that power. The question is approached from this angle in order to avoid an apparent conflict of authority upon the question whether the peace, health or safety clause is designed solely to exempt from the referendum

All Acts
or None.

Police
Power.

emergent exercise of the police power or whether it is broader than that. For the purposes of what is now to be written it makes no difference which contention is sound.

The police power aims directly to promote the "public welfare, and it does so by restraint and compulsion." These are said by Mr. Freund in his work on Police Power, Section 3, to be the "two main attributes or characteristics which differentiate the police power." It is well settled that the police power has its limitations. Generally, it is limited in its exercise to the enforcement of the maxim, "*Sic utere tuo ut alienum non laedas.*" [Tiedeman on Limitations of Police Powers, sec. 85, pp. 196-197.] For instance "in the exercise of the police power, personal liberty can be subjected to only such restraint as may be necessary to prevent damage to others or to the public." [Ibid.] According to the same author it is also well established that while the exercise of a particular calling may be regulated or prohibited if it threatens damage to the public or other individuals, and while the Legislature has a discretion to impose regulations when a proper case arises, it is nevertheless "strictly a judicial question whether the trade or calling is of such a nature as to require or justify police regulations. The Legislature cannot declare a certain employment to be injurious to the public good, and prohibit it, when as a matter of fact, it is a harmless occupation." The learned author quotes with approval from *Beebe v. State*, 26 Ind. 501: "The position, however, is taken on the part of the State, that it is competent for the Legislature, whenever it shall deem proper, to declare the existence of any property and pursuit deemed injurious to the public, nuisances, and to destroy and prohibit them as such; and that such action is not subject to be reviewed by the courts. We deny this proposition. We deny that the Legislature can enlarge its power over property or pursuits by declaring them nuisances, or by enacting a definition of a nuisance that will cover them. Whatever it has the right by the Con-

stitution to prohibit or confiscate, it may thus deal with, without first declaring the matter to be a nuisance; and whatever it has not a right by the Constitution to prohibit and confiscate, it cannot thus deal with, though it first declare it to be a nuisance." It is also pointed out that it is a judicial question whether a police regulation "extends beyond the threatened evil." For instance, the author says, in substance, a regulation which would attempt to go further than to exclude ignorant and dishonest men from the medical profession would be invalid, though a broad discretion may be used in the choice of means to accomplish that purpose. The point is that the power to restrain and compel under guise of the exercise of the police power is not unlimited. It must not overrun constitutional prohibitions or infringe constitutional rights. It can impose only such restraints as in fact bear some relation to the public good, in a general sense. A calling which involves the public health may be regulated (*State v. Smith*, 233 Mo. l. c. 267), but its free exercise cannot be hampered with burdensome restrictions and regulations which do not in any sense have in them anything tending to remove an actual, or ward off an apprehended evil to the public, and the like. [Freund on Police Power, sec. 492, p. 531.] In this connection in this State, as well as elsewhere, "The question presented where the validity of such laws is called in question is no longer the power or authority of the Legislature to enact them" (i. e., regulations affecting a calling which touches the public health) "but whether the occupation, calling or business sought to be regulated is one involving the public health and interests." [Ex parte Lucas, 160 Mo. l. c. 232, quoted in *State v. Smith*, supra.] This is the rule not only in Missouri, but generally. If this means anything it means that it is a judicial question whether the calling upon which the regulation is imposed is, as a matter of fact one which "touches the public health." This is one instance and there are many others of like character. The authorities are in accord, generally speaking, upon

the proposition that the question of fact whether a trade or calling is of such a nature as to render it subject to regulations or to particular regulations, under the police power, is strictly a judicial question. This has not yet been denied in this case. It therefore appears that there are acts which, upon the question of their validity, present to the court questions of fact. There are, in fact, many such acts. When such an act is presented and the court finds that the calling is not such that it touches the public good in such a way as to justify regulation or the particular regulation attempted, this court and all courts hold such attempted regulations invalid. This is done in the face of the fact that the very enactment of the regulatory act involves a legislative finding that existing facts justify the regulation.

The purpose of what has been said is not to attempt to define the police power and cite all cases which come within it or announce any comprehensive rule concerning it, but to show that there are instances in which questions of fact are presented to and determined by the courts and in which the implied finding of fact by the Legislature has no binding or conclusive force.

(5) Let us suppose the General Assembly, prior to the adoption of Section 57 of Article IV, had included in a regulatory act, which depended upon the police power for its validity, an express finding that a calling was subject to regulation under the police power and that the particular regulation enacted was necessary to secure the public peace, health or safety. Would this have bound the courts upon the question of fact which they would otherwise have determined for themselves and have thereby rendered valid a regulation which otherwise would have been invalid? Would the courts then have been compelled to uphold the regulation, though neither the calling nor the regulation imposed in any way touched the public welfare in such sense as to bring such calling or regulation within the police power? To these questions the authorities cited above return negative answers.

Police
Power
Prior to
Section 57.

If the answers are to be in the affirmative then by including in an act an express declaration, for instance, that a calling touched the public health and that the regulation prescribed protected the public health, the legislatures have always had the power to widen and enlarge the police power and bind courts on questions of fact with respect to which text-writers and courts agree they are not bound by the finding implied in every regulatory act which is passed, and thus evade most of the limitations on the police power found in the general language of constitutions. It will hardly be claimed this could have been done prior to the adoption of Section 57 of Article IV. It is not necessary to discuss at length the character of the presumption of validity which attends legislative enactments. It is enough for this phase of the case that it is settled that such presumption is not conclusive.

(6) With the law in this condition and the police power so limited by provisions in both State and Federal constitutions, Section 57 of Article IV was adopted. If respondent is correct, that section exempts from the referendum every legislative act in which the Assembly includes a finding that such act is necessary for the immediate preservation of the public peace, health or safety. With respect to restraints upon callings, which classes of acts have been selected to illustrate the argument, the finding that they are necessary for the immediate preservation of the public peace, health or safety is necessarily a finding that the calling "touches" the public peace, health or safety. In other words, it is a finding upon the exact question of fact which heretofore has been held to be a question for the courts when they came to the question of validity of regulations under the police power. If the inclusion of the peace, health and safety clause in an act is, as respondent contends, conclusive upon the courts, then the result is that Section 57 empowers the Legislative Assembly to widen and extend the police power to include callings and regulations to which it could not have been

**Widening
Police Power**

extended prior to the adoption of Section 57, and this by the simple use of a form of words in acts it passed without regard to the character of the regulation and despite the fact that the regulation is concededly unconstitutional had not the peace, health and safety clause been included in the act imposing it. It would enable the Legislative Assembly to remove from the realm of judicial questions every question of fact such as that referred to in the quotation in *Ex parte Lucas*, supra, and thereby largely revolutionize the law concerning the scope and extent of the police power by virtue merely of a phrase which declares that to be true which is untrue. If this marked change in the law was intended to follow the adoption of Section 57, is it unreasonable to think that the section would have been couched in language which would have at least given some hint of it? In the same article of the Constitution of which Section 57 became a part upon its adoption, appears Section 36, which pertains to the emergency clause required to put an act of the Legislative Assembly into immediate operation. This section expressly provides that the declaration of an emergency shall be put into the act intended to be put into immediate force thereby. The effect of this clause has, so far as is discovered, never been doubted. The language of Section 36 is markedly different from that of Section 57. Is it likely, that with an intent that Section 57 should, in effect, so far as the question here is concerned, have the same absolute force as Section 36, that those who framed and adopted Section 57 would have so carefully abstained from the use of a formula at hand in the very instrument they were amending, which formula would have accomplished, so far as legally possible, the purpose they had in view? Is not the avoidance of the approved formula particularly significant in view of the rather revolutionary effect of their intent if it was that which respondent ascribes to them? The difference between the words used in these two sections is wide and is inexplicable if respondent is right in his present contention.

Further, the purpose of the referendum is to "reserve to the people" the power to pass upon acts of the Legislative Assembly. That reservation is founded upon a belief that acts might be passed which would not be for the public good. In a sense it evidences a disbelief in legislative omniscience. Is it reasonable to think the people meant to reserve to themselves the power to refer acts of the Legislative Assembly because they feared that body might err in its enactments and then intended to confer upon a bare majority of the same Assembly, whose errors the referendum was designed to correct, full power to defeat any and all references of any and every bill by the simple inclusion in such bills of a set form of words, even though these words, so used, were false on their face? It will not do to say the people would have their remedy at the polls and could punish legislators by defeating them. This was true before there was a referendum section proposed and adopted. The remedy by referendum was added to that available at the polls.

Legislatures, like courts, sometimes err. The referendum has been thought designed to correct legislative errors. If respondent's position is tenable, then if the Legislative Assembly shall err and pass a bad law (in the belief that it is a good law) the error in passing this bad law is not subject to the referendum, but is exempt from such correction upon condition only that the same Legislative Assembly shall commit one more error, i. e., find as a fact that the law is necessary for the immediate preservation of the public peace, health or safety and then put this erroneous finding into the bad law. Does one error plus one error equal no error for the purposes of this case?

To ascribe such an intent to the people is to charge them with incorporating a remarkable absurdity in the organic law of the State. If the people desired that the same body whose enactments they wished to supervise by means of the referendum should have full power to prevent such supervision in every case, it seems reasonable to think they would have said so and, particularly,

would not have avoided so carefully a form of words already in the Constitution which would have been adequate to have effectuated this remarkable purpose.

(7) Further, if the section means that the people intended to bind the State courts with respect to the question of fact whether an act is necessary for the immediate preservation of the public peace, health or safety, what did they intend concerning the same finding when a case was presented to the Federal courts in which the validity of a police regulation was chal-

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State and
Federal Courts
Alike.**

lenged because it in no wise affected or touched the public good but was merely an arbitrary restraint? Will respondent contend that the power of the courts of the United States to wipe out arbitrary and excessive impositions and restraints on a finding of their own that they are so (*McLean v. Arkansas*, 211 U. S. 530) is defeated by such a finding as the Legislative Assembly has incorporated in the acts before us? Unless he so contends, what is there in the language of Section 57 which indicates an intent in the State jurisdiction which was not designed to apply to the Federal jurisdiction? The question suggested is not whether the respondent's construction of Section 57 could not stand as to the State courts even though it should be denied by the Federal courts. What is being examined is the question as to the intent of the people in adopting Section 57. The language of that section is quite general. On its face it applies to all cases in all courts. Ought it be given a construction which would clearly make it unconstitutional in some respects, when there is a more natural construction which gives effect to all of it? If it be conceded the legislative finding is not conclusive when an act is assailed as an invalid attempt to extend the police power beyond restrictions imposed by some of the provisions of the Federal Constitution, it is thereby conceded that some cases fall outside the rule for which respondent contends. But, as already pointed out, that rule, in its very nature, applies to all acts or none.

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(8) It might be argued that the legislative finding is conclusive upon the question whether an act is exempt from the referendum, but not conclusive on the same question of fact when the courts shall be called upon to consider the validity of the same act. It is but fair to respondent to say he advances no such argument. He does not deny that an act, to be exempted from the referendum, must in fact be necessary for the immediate preservation of the public peace, health or safety—as Section 57 provides. What he contends is that when the Legislative Assembly puts the peace, health and safety clause into an act it thereby conclusively determines that fact to be true and no court or person can be heard to deny the truth of that finding. So far as his argument is concerned, we do not understand him to suggest the distinction referred to in the first sentence of this paragraph. We think that in refraining from doing so he exhibited sound judgment. If, when applied to an act of the class selected above to illustrate the case, the Legislative Assembly has found the act to be necessary for the immediate preservation of the public health, for instance, and if that finding necessarily includes a finding that the calling regulated “touches the public health,” and if that finding binds the courts with respect to the matter of exempting the act from the referendum, it is difficult to see how it could be held that the people, in adopting Section 57, intended that the conclusiveness of the same finding could be evaded when the validity of the same act was drawn in question in the courts. It is the same act or law and it is the same finding. It is a finding that a particular fact in fact exists. It is not a finding that the Legislative Assembly is of opinion that the fact exists, nor a finding that it exists solely with reference to the power to exempt the act from the referendum. Section 57 requires the fact of necessity actually to exist before the exemptive power arises. The finding is that it does in fact exist. There is nothing in Section 57 which suggests that whatever finding, if any, is author-

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ized, is one thing for one purpose and another thing for another purpose. Such an intent would have been well expressed by words which would have vested directly in the Legislative Assembly power to declare the act exempt from the referendum whenever it thought proper to do so. No such words are found in the section. Did the people intend that the court should hold the same finding of fact conclusive, in one breath, and inconclusive in the next? Unless they did so intend the argument first adverted to constitutes no obstacle to the application of what has been said in preceding paragraphs. An easily conceivable result of the acceptance of the argument as true would be, that with respect to the same act, the same court would be compelled to hold the act was not referable because (being bound by the legislative finding) in truth and fact the act was within the police power, and subsequently compelled to hold that the act was not within the police power because the fact found by the Legislative Assembly was not a fact at all. Ought the people to be convicted of perpetrating such an absurdity unless they have made their intent to do so very clear? It is quite clear from the language they used that they intended nothing of the kind. The ease with which a purpose to permit the reference of laws to be defeated by a legislative declaration of something which might or might not be true could have been made evident and the careful avoidance of any expression which would evidence such a purpose are worthy of consideration in this connection. We decline to hold that those who framed and adopted this amendment did not mean what they said, but meant something which is excluded by what was said.

II. State ex rel. v. Hackman, 275 Mo. l. c. 646, and Ex Parte Renfrow, 112 Mo. l. c. 594, are cited as supporting the proposition that the finding of the Legislative Assembly is conclusive. It will hardly be contended these decisions hold that a legislative finding such as those discussed in the preceding paragraphs with respect to the applicability of the

Cases Distinguished.

police power to particular callings or activities, is final. Those cases did not involve that question. This sufficiently distinguishes them so far as concerns what appears herein.

III. The contention that the acts in question are in fact necessary for the immediate preservation of the public peace, health or safety is sufficiently considered in other opinions in this case. The argument that the courts would be without means to determine the question of fact alluded to, in case it be held that it is open to them to pass upon it, is made. No greater difficulty would be likely to be presented than those presented when the courts do pass upon questions of fact in determining whether police regulations are valid or invalid.

IV. The effect of the Oregon construction prior to our adoption is also well disposed of in other opinions in the case. The question upon which we followed such a construction in the case of State ex rel. v. Sullivan, was one which fell within the general rule. Upon such a question, one within the general rule, it is immaterial whether it is said that it is very persuasive, or that the adopting State is presumed to have adopted it, or that the courts of the adopting State are bound by it. In either case, on a question within the general rule, the previous construction is adopted. The question in this case falls within several exceptions to the general rule. This is too clear to require argument and other opinions in the case make that fact plain. The insistence that the rule in the Kadderly case must be adopted in this case, because it preceded our adoption of Section 57, assumes that the question in this case falls within the general rule upon the subject of the adoption of previous constructions and that it does not fall within any of the exceptions thereto. That this assumption is contrary to the fact will be apparent from a reading of the rule and of the exceptions to it.

Question of
Fact.

Foreign
Construction:
Exception.

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The rule and its exceptions are discussed in one or more concurring opinions and can be found there.

For these reasons and others given in other opinions filed the alternative writ should be made peremptory. *Walker and Graves, JJ.*, concur.

WALKER, J. (concurring).—The question here seeking solution is of grave importance. It involves the right of the people under the Constitution to enter into, and become a part of the law-making power of the State. Correctly determined it cannot but tend to preserve and perpetuate that right; incorrectly determined, to destroy it.

The principal opinion by Woodson, J., states in detail the facts upon which this controversy is based. However, a synopsis of same may not be inappropriate, if for nothing more than convenience of reference. The Fifty-first General Assembly repealed four laws concerning justices of the peace, their clerks and constables in certain municipal townships, and enacted other statutes relating to the same subjects in lieu thereof. To each there was appended this provision:

“This enactment is hereby declared to be necessary for the immediate preservation of the public peace, health and safety within the meaning of Section 57, Article IV, of the Constitution of Missouri.”

Despite these provisions referendum petitions were circulated and having been signed by the required number of legal voters, regarding which there seems to be no question, they were presented to the Secretary of State for filing. He refused to file them, basing his refusal on the provision attached to each above quoted. The proceeding at bar was thereupon invoked to compel affirmative action on the part of the Secretary of State.

I. It was declared by this court in *State ex rel. Kemper v. Carter*, 257 Mo. l. c. 70, that we adopted our constitutional provision in regard to the initiative and referendum from the Oregon Constitution. The Supreme

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Court of that state in constructing that portion of its constitution held in *Kadderly v. City of Portland*, 44 Ore. 118, 74 Pac. l. c. 720, that whether a law is excepted from the referendum which declares that it is for the preservation of the public peace, health and safety is a question for the Legislature. In other words, that the Legislature may arbitrarily declare any act as for that purpose, and thereby prevent its reference to the people for approval or rejection. It is to be determined therefore whether this rule is to be followed in construing the adopted provision in our own Constitution.

It may be admitted that it is a general rule when a statute or a constitutional provision has been adopted from another state that the construction here placed upon it by the highest court accompanies it and is treated as incorporated therein. This rule, however, is not absolute. [*Whitney v. Fox*, 166 U. S. 637; *Coulam v. Doull*, 133 U. S. 216.] If so, it would result not infrequently in so limiting the exercise of judicial discretion as to result in thwarting the will of the people as expressed in the constitutional provision. The arbitrary application of this rule was never intended, and cases are not wanting which demonstrate that it is subject to numerous exceptions. Especially is this true where, as in this case the foreign construction is not in harmony with the spirit and purpose of our Constitution as declared in the provision sanctioning the initiative and referendum. [Sec. 57, Art. 4, Con. Mo.; *Bowers v. Smith*, 111 Mo. 52; *Hutchinson v. Krueger*, 34 Okla. 23, Ann. Cas. 1914-C, 98, 41 L. R. A. (N. S.) 315; *Western Terra Cotta Co. v. Board Education*, 39 Okla. 716; *Boyd v. C. L. Ritter L. Co. (Va.)*, 89 S. E. 273.] Furthermore, it is held in a large number of cases that a construction of a statute by the courts of the originating state will not be followed by the courts of the adopting state, if they are clearly of the opinion that it is erroneous, and will result in the denial of a substantial right. [*Deer Lodge Co. v. U. S. Fidelity Co.*, 42 Mont. 315, Ann. Cas. 1912-A, 1010; *State v. Campbell*, 73 Kan. 688, 9 Ann.

Cas. 1203, 9 L. R. A. (N. S.) 533; *Torrance v. Edwards*, 99 Atl. (N. J.) 136; *Penn Br. Co. v. N. C.*, 222 Fed. 737, 138 C. C. A. 191; *Gr. West Sugar Co. v. Gilcrest Lbr. Co.*, 25 Colo. App. 1; *Rhoads v. Chicago Co.*, 227 Ill. 328, 10 Ann. Cas. 111, 11 L. R. A. (N. S.) 623; *People v. Griffith*, 245 Ill. 532; *Moore v. O'Leary*, 180 Mich. 268; *Dow v. Simpson*, 17 N. M. 357; *Pierson v. Minnehaha Co.*, 26 S. D. 463, Ann. Cas. 1913-B, 386; *State ex rel. Brislawn v. Meath*, 84 Wash. 302, 147 Pac. 11.] In *Pierson v. Minnehaha County*, *supra*, the court said: "This court should not, under any circumstances be found or required to follow what it deems to be an erroneous construction placed upon a foreign statute, by a foreign court, any more than we should be required to follow an erroneous decision of our own court."

In *State ex rel. Brislawn v. Meath*, *supra*, the Supreme Court of Washington, in discussing the arbitrary rule announced in *Kadderly v. Portland*, *supra*, pertinently said: "The courts are not bound by mere forms, nor are they to be misled by mere pretenses. They are at liberty—indeed, are under a solemn duty—to look at the substance of things, whenever they enter upon the inquiry whether the Legislature has transcended the limits of its authority. If, therefore, a statute, purporting to have been adopted to promote the public health, the public morals, or the public safety, has no real or substantial relation to these objects, or is a palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge, and thereby give effect to the Constitution."

In *Hutchinson v. Krueger*, *supra*, this question was given exhaustive consideration. Quoting from *State v. Campbell*, *supra*, the Supreme Court of Oklahoma says: "We recognize the force of the rule that where one state adopts a statute from another state it adopts the construction placed thereon by the courts of that state; but this is a general rule to which there are numerous exceptions. It is not an absolute rule."

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In *Dixon v. Ricketts*, 26 Utah, 215, it was said: "It is a general, though not a binding, rule of statutory construction that where the provisions of a statute have received judicial construction in one state, and it is then adopted in another state, it is adopted with the construction so given it." Further quoting from *Endlich on Statutes*, sec. 371, the court says:

" 'Whilst admitting that the construction put upon statutes by the courts of the state from which they are borrowed is entitled to respectful consideration, and that only strong reasons will warrant a departure from it, its binding force has been wholly denied, and it has been asserted that a statute of the kind in question stands upon the same footing, and is subject to the same rules of interpretation, as any other legislative enactment. And it is manifest that the imported construction should prevail only so far as it is in harmony with the spirit and policy of the general legislation of the home state, and should not, if the language of the act is fairly susceptible of another interpretation, be permitted to antagonize other laws in force in the latter or to conflict with its settled practice.' "

In *Coad v. Cowhick*, 9 Wyo. 316, 87 Am. St. 953, the court, construing a statute adopted from Ohio, refused to follow a decision of the latter court, holding a judgment not a lien upon after-acquired lands of the judgment debtor. The reasons stated by the Wyoming court were that the statute under consideration was not peculiar to Ohio, as other states had similar provisions, using the identical words, or language the same in substance, and because it considered the decision of the Ohio court to be opposed to the best reasoning and the weight of authority.

In *Ancient Order v. Sparrow*, 29 Mont. 132, 1 Ann. Cas. 144, the Supreme Court of that state in construing a statute adopted from California, said: "This court will not blindly follow the construction given a particular statute by the court from which we borrowed it, when the decision does not appeal to us as founded on right reasoning."

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The limitation placed upon the rule by this court is that the construction given by the courts of a state to a statute will be given respectful consideration by the courts where such statute has been adopted. We said thus much, no more, in the Carter Case, 257 Mo. 70.

In *State v. Campbell*, 73 Kan. 688, 9 L. R. A. (N. S.) 533, the Supreme Court of that state in construing a statute adopted from Missouri said in effect: "To regard ourselves as absolutely bound by the construction given to this statute by the Supreme Court of Missouri would give it greater weight than if it had been construed originally by our own court, in which case the right and duty of this court to disregard its former ruling would not be denied, if, upon reexamination, it should be found opposed to the better reasoning, in conflict with the great weight of authority or not in harmony with the spirit and policy of our laws."

From these cases and others of like import it will be seen that the arbitrary application of the rule in the construction of adopted statutes accords neither with reason nor precedent. The most conservative statement of its application is to be found in our later Missouri cases, in which it is said in effect that when a law is adopted by the Legislature of this State the construction placed upon it by courts of the state of its origin will be presumed to have met with the approval of the Legislature when adopting it. [*Knight v. Rawlings*, 205 Mo. 412; *State ex rel. Guion v. Miles*, 210 Mo. 127; *State ex rel. v. Carter*, *supra*.] Thus expressed the rule loses its arbitrary application and becomes as it should be, persuasive, in that if the former construction of an adopted law is found to be reasonable and in harmony with the spirit and purpose which promoted its adoption, a like construction will be given to it here. Otherwise, not.

II. It becomes pertinent, therefore, to inquire as to the spirit and purpose of the people in incorporating the initiative and referendum into our Constitution. For reasons not necessary to be enumerated here, but of suffi-

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cient impelling power to prompt action, at the time, it was determined to provide an efficient method for the checking and regulating of legislative power. This determination found expression and was given operative force in the adoption of the initiative and referendum. We are concerned here more particularly with the latter. It may be ordered, says in effect our organic law (Secs. 57, Art. IV), in regard to all matters of legislation, except laws necessary for the immediate preservation of the public peace, health or safety, appropriations of current expenses of the State government, the maintenance of State institutions and the support of public schools. Comprehensive in its terms and definite in its exceptions, it requires, as Hudibras would have it, "neither gloss or comment but may be unriddled in a moment." The case with which it may be interpreted, however, must not lessen the force of the fact, which was the moving impulse in the adoption of the amendment, that the power thereby reserved is in the people and that upon which it is to be exercised is the Legislature. In other words, the Legislature, proposes and the people dispose of its acts, either by approval or rejection as they may deem proper, save as excepted in the Constitution. Despite this unequivocal declaration of power it is contended by respondent, supported by the holding of the Supreme Court of Oregon in the Kadderly case, *supra*, that the Legislature may nevertheless determine, not only the extent to which this power may be exercised, but whether it may be exercised at all. This holding violates the spirit and destroys the purpose of the amendment. If the Legislature, as in the instant case, may except from the referendum acts abolishing the offices of justices of the peace, clerks and constables in a designated township and provide for the selection of their successors by simply declaring that such acts are for the immediate preservation of the peace, health and safety, then a like exception may be effected by appending this provision to any other act, regardless of the absurdity of its application and thus the constitutional

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Referendum.

power intended to be reserved will there by be completely destroyed.

A blind following of the rule of construction, we have discussed, stripped of all of its exceptions, is the chief refuge sought to sustain the contention that the Legislature may, in this instance by the magic of misapplied words, restore to itself a power reserved by the people to themselves. Construing the rule, however, in the light of the numerous exceptions noted and in harmony with the spirit manifested and the purpose intended to be accomplished in the adoption of the amendment, we avoid absurdities in the use of words otherwise unmistakable in their meaning, recognize without doing violence to same the limitations upon legislative power and, at the same time do not minimize that reserve to the people.

III. There is a familiar maxim, uniform in its application, that the reason of the law is the life of the law, or as the pedants put it, *Ratio legis est anima legis*.

Absurdity.

By the reason of the law we mean, of course, the occasion or moving cause, of its enactment. This is the touch stone of correct interpretation. Which, says a learned judge, "if not sought and found by the courts, they miss their prime and most august function." [Dudley v. Clark, 255 Mo. l. c. 586.] Applying this maxim to the referendum provision, we found, without doing violence to either its words, context or subject matter, that the reason for its enactment was legislative regulation. Applying the maxim to the acts under review, will, therefore, enable it to be determined regardless of barren rules or arbitrary precedents, whether the incorporation therein of the provision that they are for the preservation of the public health, etc., renders them immune from reference or whether this provision is a mere legislative *brutum fulmen*, incongruous in its setting and hence inconsistent with the subject-matter of the acts.

Enough has been said to indicate the nature of the acts under review. By their terms they apply not to the justices' clerks and constables of the State or of a certain

class of counties, but to those of townships which have or may hereafter have a certain population. This precludes their general application, and at the same time enables them to escape the constitutional pruning knife under the thinly veiled mantle of classification. As a matter of fact, of which we may take judicial notice, their present application is limited to the municipal township in which Kansas City is located. Unless, therefore, we attribute to them the virtue of Prince Ahmend's tent which, at will, would cover an army or could be folded within the compass of its owner's pocket, we cannot classify these acts as of a general nature, such as was evidently contemplated by the Constitution in the use of the word "public" in the referendum.

To emphasize this conclusion, analysis of that portion of the excepting clause here under consideration is appropriate. It will be recalled that its wording, so far as is applicable here, is "except as to laws necessary for the immediate preservation of the public peace, health or safety." The word "preservation," say the lexicographers, presupposes a real or existing danger; and "immediate preservation from" is indicative of a present impelling necessity, with nothing intervening, to prevent the removal of the danger. By the "public peace" we mean that quiet, order and freedom from disturbance guaranteed by law. [Neuendorff v. Duryea, 6 Daly (N. Y.) 276, 52 How. (N. Y.) 269; Gribble v. Wilson, 101 Tenn. 612.]

Laws in regard to "public safety" are allied in their application and effect to those enacted to promote the public peace, preserve order and provide that security to the individual which comes from an observance of law. By the "public health" is meant the wholesome sanitary condition of the community at large. [1 Bl. Comm. 122; Anderson's Law Dic.]

The meaning of these controlling words in the excepting provision, concerning the correctness of which there can be no reasonable ground of controversy, furnishes no reason, except such as may exist in the exuber-

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ant fancy of their draftsman, for the incorporation of this provision in the acts here subjected to interpretation. To assert that either the public peace or health or safety was so menaced in the township designated as to call for the enactment of a statute in the exercise of the police power, is refuted by the language and evident purpose of the acts themselves. Read with an open mind, and an intelligent understanding of the words employed, and disregarding any esoteric meaning or purpose their enactment might imply, with which we have no concern here, their real object, or *raison d'être*, to give it a Gallic flavor, was to effect a change in the personnel of the officers designated, as well as the laws defining their duties and prescribing their powers. Leaving the propriety of their enactment, and the wisdom of their terms, so far as concerns their legitimate subject-matter, out of the question, they disclose no tenable ground which will stand the test of interpretation for the incorporation therein of the provision by which it was sought to exempt them from the referendum. Plainly put, the incorporation of this appendant provision involves an absurdity the presence of which is sufficient under a well established rule of construction to authorize its rejection. It has no place or proper purpose in legislation of the character here being considered. Statutes are not to be construed so as to result in an absurdity. The provision should therefore be held to be superfluous. [Darlington Lbr. Co. v. Railroad, 216 Mo. 658; Perry v. Strawbridge, 209 Mo. 621; Johnston v. Ragan, 265 Mo. 420; Stack v. Genl. Bak. Co., 223 S. W. (Mo.) 89.]

IV. It may be conceded that every intendment should be made in favor of the propriety of legislative action. Notwithstanding this presumption, however, the courts have ever since the ruling by the Supreme Court of the United States, in *Marbury v. Madison*, 1 Cranch, 137, exercised the right to determine whether legislative enactments are violative of the Constitution: "It is," said the learned Chief Justice in that case, "emphatical-

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ly the province and duty of the judicial department to say what the law is." More imperative is this duty under modern constitutions in which the lawmaking power is no longer exclusively the province of the Legislature, but is divided between it and the people themselves. Instead, therefore, of the judicial construction of statutes, as at bar, constituting an invasion of the legislative province, it amounts to nothing more than a determination by the court as to whether the Legislature has properly exercised its discretion in declaring these acts subject to the police power exception, or whether its declaration was unwarranted, and if sustained, will result in cutting off the people's reserve power to participate in legislation. If the constitutionality of an act was, therefore, a proper matter of judicial determination before the referendum amendment, it is none the less so since, because in its last analysis, a ruling as to the proper application of the exception in the acts is nothing more than a judicial determination of their validity under the organic law. If the exception has been properly incorporated in the acts, then they are valid; if improperly incorporated, then they are invalid so far as the exception is concerned. We said in *State ex rel. Roach v. Halliburton*, 230 Mo. 408, 139 Am. St. Rep. 639, that "legislation is subject to existing constitutional restrictions." An apparent, much less a patent, violation of these restrictions will authorize judicial determination. Our power therefore is ample, to enable us to determine, as we do, free from any tenable charge of unwarranted invasion, that the legislative declaration as to the immunity of these acts from the referendum was unwarranted.

In harmony with the foregoing conclusions, and sustaining them by a carefully analyzed array of cases, is the opinion of the Supreme Court of Montana in *State ex rel. Goodman v. Stewart*, 187 Pac. 641, in which MATHEWS, J., speaking for that court, has discussed and determined with clearness and strength of conclusion almost every phase of the matter at issue. An epitome of

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these relevant rulings is all that is permissible here. They are as follows: As to whether an act is necessary for the immediate preservation of the public peace, etc., and thus excepted from the referendum, is to be controlled by the nature of the act and not by a superfluous declaration of necessity incorporated therein; that the propriety of the incorporation of the exception in an act is a judicial question; that in determining same the utmost that can be considered in the face of the act, the history of the legislation, contemporaneous declarations of the Legislature, the evil to be remedied, and the natural or absurd consequences of any particular interpretation. From all of which the conclusion is authorized that if a statute purports to be for the preservation of the public peace, health, etc., and from its words and subject-matter it has no real or substantial relation to the act, or is a palpable invasion of rights reserved by the Constitution, it is the duty of the courts to so decide and thereby give effect to the fundamental law. [Mugler v. Kansas, 123 U. S. 623, 31 Law. Ed. 205.]

We therefore concur in the conclusion reached by Woodson, J., in the principal opinion. This concurring opinion has been deemed necessary on account of the writer's dissent in *State ex rel. Westhues v. Sullivan*, 283 Mo. 547, which, upon a careful review, has been found to be unwarranted. *James T. Blair, C. J.*, and *Graves, J.*, concur.

ELDER, J. (concurring).—While I concur in the result of the opinion filed herein by my learned associate, Judge Woodson, I feel constrained to briefly express my individual views upon the question presented for determination.

As is provided in Section 57 of Article IV of the Constitution of this State, the second power reserved by the people is the referendum, and, in the language of the said section, "It may be ordered except as to laws necessary for the immediate preservation of the public peace, health or safety." The mandate of the

Constitution, coming directly from the people, is superior to the will of the Legislature. As to who shall be the judge of whether or not a law is "necessary for the immediate preservation of the public peace, health or safety," the Constitution is silent. True, the Legislature, being invested with the law-making power, must in the first instance, be the judge of the necessity in a given case, otherwise it could not act. But, is that determination, if in fact without substantial basis, final and conclusive? I think not. The discretionary power initially lodged in the legislative department of the government should not be abused but should always be exercised in a manner consonant with the true intent of the framers of the Constitution and of the people who adopted it. If, therefore, a statute purports to have been adopted to meet an emergency which palpably, from the face of the statute, does not exist, it becomes the duty of the courts to take jurisdiction and give effect to the constitutional intent and purpose. In such tribunal alone resides the power to determine whether or not the act of the Legislature conflicts with the provisions of the Constitution. [Baily v. Gentry, 1 Mo. 164; Justices' Answers, 70 Me. 1. c. 599; People v. Rafferty, 77 N. Y. Misc. 258; Cohens v. Virginia, 6 Wheat. 264; 6 R. C. L. 69.]

It has been ably suggested by my learned brother HIGBEE that the Initiative and Referendum Amendment under review was taken from the Constitution of Oregon and that we are bound by the construction placed upon it by the Supreme Court of that state, which court ruled that the declaration of the Legislature upon the question of necessity was conclusive. While it may be conceded that the general rule is as stated, nevertheless that rule is not absolute or imperative and has its exceptions. One of these exceptions is that where the courts of the adopting state are of the opinion that the foreign construction is erroneous, the borrowed law does not carry with it the prior construction in the originating state. [Ancient Order of Hibernians v. Sparrow, 29 Mont. 132; State v. Campbell, 73 Kan. 688; Whitney v. Fox, 166

U. S. 637.] While the interpretation put upon statutes or constitutional provisions by the state from which they were taken are persuasive and are entitled to respectful consideration, nevertheless that interpretation should be founded on right reasoning. Because the Supreme Court of the State of Oregon may have ruled that the Legislature alone can determine whether or not an emergency exists, that ruling should not bind this court if, for instance, our Legislature should enact a law designating a certain flower as the official state flower and containing an emergency clause reciting that the measure was for the immediate preservation of the public peace, health and safety. Would any one argue that such an absurd and arbitrary *dictum*, declaring such a law necessary for the immediate preservation of the public peace, health and safety, was rightfully intended to have the effect of withholding the right of referendum should an attempt be made to invoke it? And yet such would be the consequence if the reasoning of the Supreme Court of Oregon is to be followed. Such a doctrine would be totally destructive of the referendum, for, by the mere *ipse dixit* of the Legislature, without cause in truth or fact, any measure could be withheld from ratification or rejection by the people at the polls.

In the instant case, to say that the preservation of the public peace, health and safety demands the immediate abolition, in one certain township, of the offices of eight justices of the peace and constables (who from the record before us are to be presumed to be properly and efficiently discharging their respective duties), and the immediate appointment of new justices and constables, is asking us to go far afield from the true intent of the constitutional provision invoked by respondents.

Entertaining the views above indicated, I am of the opinion that the writ of mandamus should be made permanent. *James T. Blair, C. J., Graves and Walker, JJ., concur.*

HIGBEE, J. (dissenting).—I respectfully dissent from the opinion filed in this case by our learned brother

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WOODSON. It is based solely upon the opinion of GRAVES, J., in State ex rel. Westhues v. Sullivan, 283 Mo. 547. That was an action instituted by the Prosecuting Attorney of Cole County against the Secretary of State and the Attorney-General of the State, restraining them from submitting the Workmen's Compensation Act under the Referendum Amendment, Section 57, Article IV, of the Constitution. All of the judges were agreed on certain points: (1) that the prosecuting attorney had no authority to bring the action to restrain the State officials; (2) the referendum petitions not having been filed in the office of the Secretary of State, the action was premature; (3) the emergency clause to the act sought to be referred did not declare that the measure "is necessary for the immediate preservation of the public peace, health or safety. . . . But, for our present purpose, it suffices to say that the emergency clause does not bring the measure within the excepted class named in the Constitution." [Page 334.] Judge GRAVES, however, proceeded in a learned and interesting opinion in view of the fact that the question might arise *in futuro*. Judge WOODSON concurred. Judge WALKER did not concur in the reasons or conclusion of Judge GRAVES. What the other judges said will be noted later in this opinion.

Judge GRAVES, at page 334, said: "As said by FARIS, J., in State ex rel. v. Carter, 257 Mo. l. c. 70, we borrowed our referendum provision from Oregon and borrowed it after the ruling in the Sears Case, *supra*."

The Initiative and Referendum Amendment was adopted in this State at the November election in 1908. It was taken almost literally from the Constitution of Oregon. [State ex rel. v. Carter, 257 Mo. 52, 68.] In the year 1904, the Supreme Court of Oregon, in Kaddery v. Portland, 44 Ore. 118, 75 Pac. 222, in passing on the question raised in this case, expressly ruled that the action of the Legislature declaring that an enactment is necessary for the immediate preservation of the public peace, health and safety, etc., is final and conclusive,

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and cannot be questioned in any judicial proceeding. We quote in part from the opinion:

"The amendment excepts such laws as may be necessary for a certain purpose. The existence of such necessity is therefore a question of fact, and the authority to determine such fact must rest somewhere. The Constitution does not confer it on any tribunal. It must, therefore, necessarily reside with that department of the government which is called upon to exercise the power. It is a question of which the Legislature alone must be the judge, and when it decides the fact to exist, its action is final. [Briggs v. McBride, 17 Ore. 640, 21 Pac. 878, 5 L. R. A. 115; Umatilla Irrig. Co. v. Barnhart, 22 Ore. 389, 30 Pac. 37; Gentile v. State, 29 Ind. 409; Wheeler v. Chubbuck, 16 Ill. 361; Sutherland on Stat. Const. 108.] In this view we are supported by the Supreme Court of South Dakota. In 1898 an amendment to the constitution of that state was adopted by the people, similar in many respects to the amendment now under consideration; and, so far as the laws exempted from its operation are concerned, the language of the two amendments is identical. In *State ex rel. v. Bacon*, 14 S. D. 394, 404, 85 N. W. 225, the court say in referring to this amendment: 'It will be observed that the law of 1901 which we are considering not only declares that an emergency exists, but also that the "provision is necessary for the immediate preservation and support of the existing public institutions of this state."' It seems to have been uniformly held under constitutions containing an emergency clause, and providing that laws containing such a clause shall take effect as therein directed, that the action of the Legislature, in inserting such a clause is conclusive upon the courts (citing authorities). No reason occurs to us why the same rule should not apply to the act in question. The Legislature having declared that the provisions of that act are necessary for the immediate preservation and support of the existing public institutions of the state, that declaration is conclusive upon this court, and brings this

class clearly within the exception contained in Section 1 [as amended] of Article 3 of the Constitution.'

"But, it is argued, what remedy will the people have if the Legislature, either intentionally or through mistake, declares falsely or erroneously that a given law is necessary for the purposes stated? The obvious answer is that the power has been vested in that body, and its decision can no more be questioned or reviewed than the decision of the highest court in a case over which it has jurisdiction. Nor should it be supposed that the Legislature will disregard its duty, or fail to observe the mandates of the Constitution. The courts have no more right to distrust the Legislature than it has to distrust the courts. The Constitution has wisely divided the government into three separate and distinct departments, and has provided that no person charged with official duties under one of these departments shall exercise any of the functions of another, except as in the Constitution expressly provided. [Const. Or., art. 3, sec. 1.] It is true that power of any kind may be abused when in unworthy hands. That, however, would not be a sufficient reason for one co-ordinate branch of the government to assign for attempting to limit the power and authority of another department. If either of the departments, in the exercise of the powers vested in it, should exercise them erroneously or wrongfully, the remedy is with the people, and must be found, as said by Mr. Justice STRAHAN in *Briggs v. McBride*, 17 Ore. 640, 5 L. R. A. 115, 21 Pac. 878, in the ballot box. We are of the opinion, therefore, that the findings and declarations of the Legislature that the Act of 1903 for the incorporation of the city of Portland was necessary for the immediate preservation of the public peace, health, and safety are conclusive on the courts, and consequently the charter was not subject to the referendum power, and was in force and effect from and after its approval."

When we adopted the Referendum Amendment from the Constitution of Oregon, we adopted the construction given it by the Supreme Court of that State as much

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as if that construction had been written into the body of the amendment. [State ex rel. v. Carter, *supra*, l. c. 69; State ex rel. Guion v. Miles, 210 Mo. 127, 146.]

Judge JAMES T. BLAIR filed an opinion in the Sullivan Case in which WILLIAMS, GOODE and WILLIAMSON, JJ., concurred. It is as follows:—

“I concur in Paragraphs I, II and III. In Paragraph IV, I concur because we are bound by the construction given the Oregon Constitution by the Supreme Court of that State prior to our adoption of its provisions. With respect to Paragraph V, it is enough to say that the expressions in Section 81, therein referred to, do not indicate any intent to put the act in force under the public peace, health or safety clause of the referendum section of our Constitution. As to the ‘broader question,’ I express no opinion. It cannot be involved in this case. In the remaining paragraphs I concur.”

So it appears that the propositions decided in that case are that the prosecuting attorney could not institute the proceedings against the State officials, that the action was premature, and that the act did not declare it was necessary for the immediate preservation of the public peace, health or safety, and there was no question before the court for determination. Nevertheless, Judge GRAVES proceeded to discuss a supposititious case. His rulings were clearly *obiter dicta*. Five of the judges disagreed with his conclusions. Four of the judges held that we are concluded by the interpretation given the act by the Supreme Court of Oregon. The decision is, therefore, a direct authority in favor of our contention that we adopted the Referendum Act with the construction given it by the Supreme Court of the State of its origin.

But it is said: Suppose the Legislature should declare a legal holiday and embody in the act the “‘peace, health or safety” clause. Would this court be concluded by the declaration? The answer is: We have no such case before us. The Constitution has solemnly

vested the legislative power of this State in the General Assembly of the State of Missouri. That body is an independent, co-ordinate department of our government, answerable only to the people of the State for the execution of the powers delegated to it by the Constitution. Moreover the measure may be submitted to a direct vote of the people by an initiative petition, so that there is no foundation for the suggestion that the Legislature may, by fraud or trickery, prevent legislation by the people.

As was well said in *Oklahoma City v. Shields*, 22 Ok. 265, 100 Pac. 559, 1. c. 576:

"To determine, under a state Constitution, what can be accomplished by general or special legislation, has been, with but few exceptions, held to be a question solely for the Legislature. [Citing cases.]

"We conclude that the judgment of the Legislature in determining whether or not an emergency existed—that is, whether or not a measure is immediately necessary for the preservation of the public peace, health, or safety—rests solely with the Legislature. It is not subject to review by the courts, or any other authority except the people. Under the reserved power of the initiative and referendum, after the declaration of an emergency, when not referred to the people for their judgment in such measure, it still remains with the people, if they are dissatisfied with a measure, by an initiative petition to cause the same to be submitted to the people at the next general election for determination as to whether or not such act shall be repealed."

In *State v. Moore*, 103 Ark. 48, 145 S. W. 199, 1. c. 202, the court said:

"It was a question exclusively for legislative determination; and such determination alone could bring it within this exception and power of the Legislature to make it immediately effective, and thereby remove it from the general class of laws upon which the people reserved the right to order the referendum. [*Stevens v. Benson*, supra; *Kadderly v. Portland*, 44 Or. 118, 74 Pac. 720; *Sears v. Multnomah County*, 49 Or. 42, 88

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Pac. 522.]” See, also, Van Kleeck v. Ramer, 62 Colo. 4, 156 Pac. 1108.

“But it belongs to the political, and not to the judicial, department of the government to determine these interesting and important questions of civic policy, as its wisdom shall deem for the best interests of the people.” [State ex rel. v. Bacon, 14 S. D. 394, 85 N. W. 225, 228.]

Being of the opinion reached by the majority of the court in the Sullivan case, supra, that we are concluded by the interpretation given to the Referendum Amendment in the Kadderly Case, and that we are without power to question the finding of the Legislature in the premises my conclusion is that the writ should be denied.

DAVID E. BLAIR, J. (dissenting).—I am unable to concur in the views expressed or the result reached in the opinion filed by my learned brother Woodson.

In the first place the case of State ex rel. v. Sullivan, 283 Mo. 547, 224 S. W. 327, relied on as the sole authority for said opinion, does not even purport to decide the question involved in this case and the expression of opinion on the question here involved made in that case does not even rise to the dignified status of *obiter dicta*. In passing on the questions really involved in the Sullivan Case, supra, GRAVES, J., expressed as his view that the legislative declaration that an act passed by the General Assembly is necessary for the immediate preservation of the public peace, health and safety, is not binding on the Court and whether such act may be submitted to the people under the provisions of our Constitution in relation to the referendum is subject to judicial review and such declaration is not binding on the courts. WOODSON, J., concurred in those views. In that case the views as expressed were *obiter*, because no question of that sort was in the Sullivan Case. WALKER, C. J., expressly dissented to that view and WILLIAMSON, GOODE, BLAIR and WILLIAMS, JJ.,

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made it very clear in their separate concurrence that they expressed no opinion on the question, because that question was not in that case for decision. That case is, therefore, utterly valueless as an authority in the case before us.

It is settled beyond any question that when one state borrows a statute or a constitutional provision from another state and the highest court in that state has authoritatively construed said statute or constitutional provision prior to its adoption in the second state, such statute or constitutional provision is held to have been adopted together with such construction by such highest court. [Skouten v. Wood, 57 Mo. 380; State ex rel. v. Miles, 210 Mo. 1. c. 146; State ex rel. v. Sullivan, 224 S. W. 327.]

There appears to be no question that the referendum provision to our Constitution was borrowed from the State of Oregon. [See opinion of GRAVES, J., in State ex rel. v. Sullivan, 224 S. W. 327.]

In the case of Kadderly v. Portland, 44 Ore. 118, 75 Pac. 22, it was squarely decided by the Supreme Court of Oregon, on January 11, 1904, and more than four years before the referendum amendment was added to our Constitution, that the declaration of the Legislature that a given act is necessary for the immediate preservation of the public peace, health and safety is final and that such declaration is conclusive on the court. That construction was part of the provision when we borrowed it from the State of Oregon; and if not absolutely binding on this court is persuasive authority of the highest character.

In addition the highest courts of the States of Oklahoma, South Dakota, Arkansas and Colorado have ruled on very similar constitutional provisions as has a Supreme Court of Oregon.

While it is true the conclusion reached by my brother Woodson is the same as that of the Supreme Courts of California, Washington and Michigan, I note that it is pointed out in respondent's brief as follows: "Out

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of twelve cases determined by the various supreme courts, eight were decided by an undivided court; of these eight, six determined the question of final determination in favor of the Legislature, and two determined that question in favor of the courts. Of the cases determined by a divided court, two determined the question in favor of the Legislature and two in favor of the courts. Of the cases decided by a divided court twenty-eight judges gave their opinion on the question, fifteen deciding in favor of legislative determination and thirteen in favor of judicial determination. In the twelve courts passing on this question, sixty-eight judges participated, forty-three of whom decided the question in favor of the legislative determination and twenty-five in favor of judicial determination." Thus it is seen that the weight of authority is decidedly against the conclusion that this is a matter for determination by the court.

On principle and independent of the decided cases, I am of the opinion that the courts are and should be bound by the declaration of the Legislature, and for these reasons I dissent.

INDEX.

ABSTRACT.

1. **Appeal: No Abstract of Record Proper: Amended Rule 31.** The amendment to Rule 31 of the Supreme Court (adopted December 31, 1920) means that if matters of record proper are omitted from the record proper, but are shown in the bill of exceptions in appellant's abstract, that will be sufficient, unless the respondent objects as provided in said rule, but if such objection is made appellant must file a corrected abstract of and from the record proper, showing the record entries referred to in respondent's objections as was required before said amendment was made. *Burrus v. Hendricks*, 130.
2. ———: ———: ———: **Uncorrected by Additional Abstract.** Where appellant's original abstract fails to show in the record proper that a final judgment was entered, that a motion for a new trial was filed and overruled, that a bill of exceptions was signed, sealed and filed, or that an appeal was allowed, although such record matters are set forth as a part of the bill of exceptions; and respondent files objections thereto, pointing out such deficiencies; and appellant's additional abstract sets forth as a part of the record proper a copy of the judgment, but contains no copy or summation of record entries showing a motion for a new trial was filed and overruled, or that a bill of exceptions was approved and filed, or that an appeal was allowed, there is nothing for the Supreme Court to consider except the pleadings and judgment, and there being no error upon their face, the judgment will be affirmed. *Ib.*

ACTIONS.

1. **At Law: Equitable Defense: Subrogation: Destroying Action.** To convert an action at law into a suit in equity the matters set up in the answer as constituting the equitable defense must, taken as true, destroy plaintiffs' right to recover, and must ask for affirmative relief on that ground. *State ex rel. Ins. Co. v. Reynolds*, 382.
 2. ———: ———: **On Insurance Policy: Subrogation to Plaintiffs' Right.** Where the trustee and mortgagee brought action on a fire insurance policy, which contained a rider to the effect that, when the company shall pay the loss to the trustee or mortgagee and claim no liability to the mortgagor existed, it shall be legally subrogated to the rights of the party to whom the payment is made, said rider did not purport to destroy the plaintiffs' legal action on the policy as their interest might appear, and a plea of its provisions in defendant's answer, which also denied liability on the policy, did not convert the action at law into a suit in equity. *Ib.*
 3. ———: ———: ———: ———: **No Payment.** Where the trustee and mortgagee bring suit on a fire insurance policy, which contains a clause that the company, upon paying the loss to them, may be subrogated to all their rights under any securities executed by
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the mortgagor and held by them, a plea asking that defendant be so subrogated is unavailing, and so far as the plaintiffs are concerned states no equity, if the defendant has neither paid plaintiffs' demand nor paid the amount thereof into court for their benefit. There can be no subrogation to a plaintiff's rights until his demand has been paid. *State ex rel. Ins. Co. v. Reynolds*, 382.

4. **Equitable Defense: Subrogation: Concealment of Real Owner: Knowledge of Company: Action at Law.** Property was conveyed to Martin and the deed recorded, and a fire insurance policy was issued to him as the insured; immediately thereafter, by an unrecorded deed, Martin conveyed to Krupnick, who was in fact the beneficial owner, and who executed certain notes to one of the plaintiffs and secured them by a deed of trust to the other as trustee, and said trustee and the payee of the notes bring suit on the policy. Defendant, by answer, prayed that Martin and Krupnick be made parties defendant, and pleaded that the policy was void because of the concealment from defendant of lack of title in Martin and of the interest of Krupnick. Being made parties, Martin disclaimed any beneficial interest and averred that the property was conveyed to him for the purpose of having it conveyed to Krupnick; Krupnick pleaded that he was the owner of the real estate, subject to the deed of trust; that defendant had full knowledge of all the facts before and after said policy was written, and with such knowledge received and retained the premium, and that by reason of such knowledge the policy was not void. In its counter-plea, defendant denied it had said knowledge. *Held*, that these issues were purely legal in their nature and triable by a jury; and that the action on the policy was not converted into a suit in equity, by a further plea by defendant that it was subrogated, by the terms of the policy, to the mortgagee's right to the notes executed by Krupnick, for such plea did not purport to destroy Krupnick's right of action, and even if it had it would have been unavailing, because defendant had not paid plaintiffs' demand. *Ib.*
5. **Dower: Homestead: Ejectment: Equitable Defense: Affirmative Relief.** The widow conveyed her "life interest" in the homestead property, and then re-married, and more than ten years thereafter her grantee brought ejectment to have dower assigned and admeasured and to recover the same. To this action she, being in possession and all the householder's children having reached their majority, filed a cross-bill, alleging that her deed, made nineteen years prior thereto, was void for fraud perpetrated upon her by the grantee, and asking that said deed be cancelled, and claiming that she was entitled to exclusive possession by virtue of her statutory quarantine. *Held*, that the court having adjudged that the action of her grantee to recover dower was barred by limitations, and that judgment being affirmed on appeal, that holding put the plaintiff out of the case, and it likewise settled the entire controversy, for the only use she could then make of a judgment annulling her deed would be to aid her in procuring an assignment of dower as against the children of her husband, and the pleadings make no such issue between her and them. *Smith Bros. Land Co. v. Phillips*, 595.

ADMINISTRATION.

1. **Equitable Partition: Personal Property: After Final Settlement.** Where the will, duly probated, is set aside in a contest proceeding,

ADMINISTRATION—Continued.

the personal property distributed among the legatees in accordance with the direction of the will and the orders of the probate court, should be brought into hotch-pot in an equitable partition, and each heir given his proportionate share thereof, as if there had been no will, and the amounts distributed to the favored legatees should be considered as advancements, which means that no interest is to be charged thereon. But where the testator's widow has died, the amount of money distributed to her, in accordance with the will, at and prior to the final settlement in the probate court, should not be brought into hotch-pot. *Byrne v. Byrne*, 109.

2. ———: ———: **Effect of Final Settlement.** A final settlement made in the probate court in accordance with the directions of a will, duly probated, does not, when the will is annulled in a contest proceeding, bar an inquiry into the rights of the cotenants, in an equitable partition, to the personal property distributed in accordance with such final settlement; for it was made subject to be set aside and annulled in case of a successful contest of the will, and the will being set aside the amount of money, shown by said final settlement to have been distributed to the legatees, must be brought into hotch-pot, as advancements to them, and distributed among the heirs as if the testator had died intestate. *Ib.*

ALIENATION.

1. **Divorce: Estoppel by Judgment in Alienation Suit.** A judgment for divorce, in an action brought by the wife against her husband, to which he made no defense, determines the status of the parties to it, but is not conclusive upon strangers as to the facts in said suit litigated, and does not operate as an estoppel in a suit by the husband against the seducer of the wife for criminal conversation and the alienation of her affections, even though her petition in the divorce suit alleged as one ground for divorce that her husband had charged her with adultery with the said seducer. The seducer not having been a party to the action for divorce, a judgment for the wife therein was not such an adjudication that the seducer had not committed adultery with the wife as estops the husband from maintaining an action for damages against the seducer for alienation and criminal conversation with the wife prior to the time the divorce judgment was rendered. *Pollard v. Ward*, 275.
2. ———: ———: **Petition and Judgment as Evidence.** But the petition and judgment in the wife's suit for divorce brought against the husband, in which she alleged as a ground therefor that he had charged her with adultery with a certain man, are admissible in evidence in a subsequent action by the husband against such man for damages for alienating the affections of the wife, as admissions, even though the husband filed no answer in said suit, but they are admissible not as conclusive against him, but only as any other admissions which may go to the jury for what they are worth. *Ib.*
3. ———: **Estoppel by Conduct.** The husband is not estopped by his failure to file an answer in the divorce suit brought by his wife, in which she alleged as one ground for divorce that he had charged her with adultery with a certain man, from maintaining an action for damages against said man for alienation and criminal

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conversation committed prior to the time the suit for divorce was instituted; for, even though it be conceded that the husband's conduct in the divorce suit in defaulting and failing to meet the wife's charge is inconsistent with his claim for damages in the alienation suit, two necessary elements of estoppel *in pais* are lacking, namely, the defendant did not act upon the faith of the husband's conduct in the divorce suit, for his criminality with the wife occurred before that suit was brought, and, second, the defendant is not injured in any manner by the husband's failure to contradict or controvert the wife's charges in the divorce suit. *Pollard v. Ward*, 275.

4. **Divorce: Estoppel by Property Settlement.** The fact that the husband in the divorce action brought by his wife paid his wife four thousand dollars as alimony and obtained from her a deed by which she conveyed to him her interest in property which he had acquired from her father, in no wise affects the defendant in the husband's suit for alienation and criminal conversation with the wife, and hence does not constitute estoppel. *Ib.*
5. —: **Instruction: Conduct Calculated to Prejudice: Omission of Words Cause to Separate.** In an action for damages for the alienation of the affections of plaintiff's husband, in which the petition charged that defendant caused plaintiff's husband to separate from her, prevented communication between them and maliciously prevented a reconciliation, an instruction declaring that "if defendant was intentionally guilty of such conduct as was calculated to prejudice plaintiff's husband against plaintiff and to alienate him from her and to prevent a reconciliation between them, and that plaintiff was thereby deprived of the society, companionship, comfort, protection, aid and affection of her husband, your verdict will be for plaintiff," was not error; and where said instruction as asked declared that "if defendant was guilty of such conduct as was calculated to cause their separation and to alienate the affections," etc., "and did cause him to separate from and abandon plaintiff," its modification by the court so as to omit the words "cause their separation" and "did cause him to separate and abandon plaintiff," the giving of it with these words omitted was not prejudicial error against defendant. *Hollinghausen v. Ade*, 362.
6. —: **Calculated to Cause.** It is enough that the instruction require that defendant's conduct was calculated to cause plaintiff's husband to separate from her, and to prevent a reconciliation between them, without requiring that it "actually did" cause the separation and prevent the reconciliation. If by the intentional interference of defendant with the marital relations of her brother and his wife, the wife is deprived of the companionship of her husband, she is entitled to a verdict for alienation. A modification of the instruction so as to require the jury to find that defendant's conduct "actually did cause him to separate from and abandon plaintiff" was not necessary; but it is a modification of which defendant cannot complain. *Ib.*
7. **Estoppel: Alimony Paid: Mutuality.** The fact that plaintiff, after her husband's separation from her, brought an action of divorce against him, and in the settlement of her claim for alimony obtained \$7,500 from him, in consideration for her deed releasing all claims to his estate, does not estop her from maintaining an

ALIENATION—Continued.

- action for damages against his sister for alienating his affections and causing him to separate from her. There was no mutuality between the plaintiff in the divorce case and defendant in the alienation suit, and without mutuality there can be no estoppel. *Ib.*
8. **Damages: Injury to Feelings: Loss of Society.** The wife, in her suit for the malicious alienation of her husband's affections and separation from her, can recover damages for injury done to her feelings and the loss of the support, comfort and society of her husband. *Ib.*
 9. **Caused by Plaintiff: Unpleaded.** In an alienation case, an instruction telling the jury that if plaintiff herself by her conduct caused her husband to separate from her, the verdict must be for defendant, being an issue not pleaded, should be refused. *Ib.*
 10. **Sister's Privilege: Counsel and Advice.** There is no initial presumption of good faith on part of a sister who interferes in the marital relations of her brother and plaintiff. The law does not presume that advice and counsel given by a sister to her brother to separate from his wife is given in good faith. She does not possess the superior right of a parent. *Ib.*
 11. **Duration of Damages: Separation and Divorce.** Where defendant caused plaintiff's husband to separate from her, she is entitled to damages from the time he separated from her, and not simply from the time she obtained a judgment of divorce from him, and not simply from the time he separated from her up to the time of the judgment for divorce. *Ib.*
 12. **Excessive Verdict.** There is no scale by which the damages of a wife can be graduated with certainty in an alienation suit, although her husband separated from her on March 31st and died on June 9th. Where the evidence shows a malicious and unlawful interference by a sister in the marital relations between her brother and the plaintiff; that upon his separation from plaintiff the defendant sister persistently and successfully kept them apart, although she knew they were anxious to become reconciled, and succeeded in preventing a reconciliation or even communications between them up to the time of his death, a verdict for ten thousand dollars actual and five thousand punitive damages will not be held to be excessive. *Ib.*

ALTERATIONS.

Note: Explanations: Presumption. Where an alteration or erasure upon a note appears suspicious—for instance, where chemical and handwriting experts testify that erasures had been made on the face of the notes, indicated by the scratched and roughened condition of the paper; that the ink used at the point of erasure was different in composition and color from that used elsewhere on the notes, and that the effect of the erasures in one instance was to change the sum payable and in another to change the date—they demand explanation. Such changes are material alterations, and in their presence the law does not presume that they were made at or prior to the execution of the notes, but it demands that they be satisfactorily explained. *Lawson v. Meffert*, 337.

APPEALS.

1. **Decree on Another Ground.** The decree of the trial chancellor cancelling and annulling a deed being correct will be upheld on appeal, although he reached that conclusion on the ground that the deed "was not executed and delivered," and the Supreme Court are of the opinion it was testamentary in character and therefore void. *Coles v. Belford*, 97.
2. **No Abstract of Record Proper: Amended Rule 31.** The amendment to Rule 31 of the Supreme Court (adopted December 31, 1920) means that if matters of record proper are omitted from the record proper, but are shown in the bill of exceptions in appellant's abstract, that will be sufficient, unless the respondent objects as provided in said rule, but if such objection is made appellant must file a corrected abstract of and from the record proper, showing the record entries referred to in respondent's objections as was required before said amendment was made. *Burrus v. Hendricks*, 130.
3. ———: ———: **Uncorrected by Additional Abstract.** Where appellant's original abstract fails to show in the record proper that a final judgment was entered, that a motion for a new trial was filed and overruled, that a bill of exceptions was signed, sealed and filed, or that an appeal was allowed, although such record matters are set forth as a part of the bill of exceptions; and respondent files objections thereto, pointing out such deficiencies; and appellant's additional abstract sets forth as a part of the record proper a copy of the judgment, but contains no copy or summation of record entries showing a motion for a new trial was filed and overruled, or that a bill of exceptions was approved and filed, or that an appeal was allowed, there is nothing for the Supreme Court to consider except the pleadings and judgment, and there being no error upon their face, the judgment will be affirmed. *Ib.*
4. **Record On Appeal: Affidavit: Error of Stenographer.** On an appeal the bill of exceptions imports verity; and an affidavit made by the attorney for appellant, to the effect that the word "satisfactory" was used by him in a question he propounded to a juror on his *voir dire* examination, and not the word "unsatisfactory" as the bill of exceptions shows, availeth nothing, the trial court having made no order directing an amendment of the record. *Pietzük v. K. C. Rys. Co.*, 135.
5. **Erroneous Judgment: No Supersedeas: Execution: Title of Purchaser.** Where the judgment of the circuit court in an action for debt was for plaintiff and was not void, but only erroneous, and on writ of error without a *supersedeas* staying execution was reversed, but before said writ issued execution was issued and levied on defendant's land, the purchaser at such sale, if a stranger to the proceeding, takes the title, which is in no way impaired by such reversal. *Sidwell v. Kaster*, 174.
6. **Will Contest: Substituted Pages: Finding of Jury Conclusive.** After the will was written it was submitted to the testatrix, who said it was what she wanted. Two neighbor women were called in and testatrix showed them the instrument, told them it was her will, expressed satisfaction with it and asked them to witness it, and this they did. On cross-examination of these witnesses it was developed that they were unable to identify positively sheets one

APPEALS—Continued.

- and two of the instrument, and were able so to identify only sheet three on which their signatures appeared; but the draftsman testified he was present when the will was signed and that it was then in the exact condition in which it was when put in evidence at the trial, and there was no evidence of fraud, but there was ample evidence, direct and otherwise, that the instrument was her genuine will. *Held*, that there was no ground for so much as a suspicion that the will signed by testatrix was not the same document put in evidence at the trial, but the question being nevertheless submitted to the jury the finding sustaining the will is conclusive on appeal. *Elam v. Phariss*, 209.
7. **Evidence: No Objection.** Unless objection is raised to testimony at the time the witness states it, its competency will not be ruled on appeal. *Pollard v. Ward*, 275.
 8. **Appellate Jurisdiction: Transfer by Court of Appeals.** Where a case has been transferred to the Supreme Court for the reason that one of the judges of the Court of Appeals believes its decision therein is in conflict with a decision of another Court of Appeals in another case, it is the duty of the Supreme Court to hear and determine the case as it would any other case in which it had obtained jurisdiction by ordinary appellate process, and the question of conflict drops out of the case. *Brunswick ex rel. v. Benecke*, 307.
 9. **Denial of Writ in Another Case.** The denial of a writ in another similar case by merely marking the word "denied" on the application cannot be considered as overruling previous decisions. Writs are frequently denied for reasons which do not arise out of substantive law. *In re Oppenstein*, 421.
 10. **Action At Law: Weighing Evidence on Appeal.** An action of fraud and deceit, brought by the purchaser of stock of a corporation for damages, based upon the false representations of the defendant as to its value, is an action at law, and if there is substantial evidence to support the verdict of the jury, its weight is not for the consideration of the appellate court, however sharp are the issues of facts presented; but, the case being without error committed in the trial, the judgment approved by the trial court will be affirmed. *Morrow v. Franklin*, 549.
 11. **Instructions: Demurrer.** If the defendant was not guilty of negligence, or if its negligence was not the proximate cause of plaintiff's injury, or if the plaintiff herself was guilty of contributory negligence as a matter of law, she has no cause to submit to the jury, and, defendant having asked a demurrer to the evidence, which was refused, no error in the instructions need be considered on appeal, for in such situation there could be no reversible error in any instructions given or refused for either party. *Waldmann v. Skrainka Const. Co.*, 622.

ARGUMENT TO JURY. See **Attorneys**.

ATTORNEYS.

1. **Argument to Jury.** Where counsel for plaintiff in their argument to the jury went outside the record and made unduly inflammatory remarks, but the trial court, upon objection, directed the

ATTORNEYS—Continued.

jury not to consider them, and the size of the verdict indicates that they were not influenced thereby, the judgment will not be reversed. *Kilburn v. Ry. Co.*, 75.

2. **Argument to Jury: Reading From Medical Book.** Counsel for plaintiff, in cross-examining physicians offered as witnesses by defendant, used several medical books, and got one of the physicians to admit that a certain passage in one of them was correct doctrine and to say that he would adopt it as an expression of his own views, and this passage counsel for plaintiff, in his argument, was reading to the jury when the trial judge stopped him and told him he had no right to read from the book, as it had not been offered in evidence. *Held*, that the conduct of counsel was not reversible error. *Ib.*
3. **Argument to Jury: Character of Defendant: Withdrawal.** In his closing argument to the jury plaintiff's counsel said that no jury would live long enough to sit on a case against the defendant company in which that company would not come in without a defense of some kind. Defendant's counsel objected that the remark was outside of the record, wholly incompetent and prejudicial, and asked that plaintiff's counsel be reprimanded. The court directed counsel to proceed, to which action defendant's counsel excepted. Thereupon plaintiff's counsel withdrew the remark, and substituted another to the effect that the defendant company could not be expected to come into court and admit liability, to which no objection was made. *Held*, that the trial court was in a better position to determine the propriety and effect of the first statement made by plaintiff's counsel than is the appellate court; that the fragmentary part of the counsel's speech was not sufficient to have influenced the jury in arriving at their verdict; and that if there was any transgression of proper argument it was cured by its withdrawal. *Pietzuk v. K. C. Rys. Co.*, 135.

AUTOMOBILE.

Automobile And Pedestrian: Relative Rights to Street: Duties to Each

Other. A pedestrian, equally with the operator of an automobile, has the right to be upon and use the traveled part of a public street instead of the sidewalk, and it is not as a matter of law the duty of a pedestrian, while walking along the traveled part of a highway, to turn about constantly and repeatedly to observe the possible approach of vehicles from the rear. On the contrary, such a pedestrian may assume that the operator of the automobile will exercise ordinary care in keeping a lookout; that under ordinary conditions he will be discovered by such operator; and that the operator, as he approaches, will slow down and give an audible signal with his horn; but he is also required to be on the lookout for automobiles, and to exercise ordinary care for his own protection, according to the circumstances of the situation in which he finds himself. *McKenna v. Lynch*, 16.

BENEFIT ASSESSMENTS. See **Streets.**

BEVERAGE INSPECTION. See **Inspection.**

BILL OF EXCEPTIONS.

Record On Appeal: Affidavit: Error of Stenographer. On an appeal the bill of exceptions imports verity; and an affidavit made by the

BILL OF EXCEPTIONS—Continued.

attorney for appellant, to the effect that the word "satisfactory" was used by him in a question he propounded to a juror on his *voir dire* examination, and not the word "unsatisfactory" as the bill of exceptions shows, availeth nothing, the trial court having made no order directing an amendment of the record. *Pietzduk v. K. C. Rys. Co.*, 135.

BONDS.

Railroad Corporation: Issuance of Bonds: Property Right. The provision of a railroad company's mortgage, covering all present and subsequently acquired properties, that, upon making future extensions and improvements, it could issue other bonds equal to eighty per cent of the value thereof, upon a showing that its net earnings for twelve months had been equal to twice the interest on its existing indebtedness, is a property right, and cannot be destroyed by any unreasonable subsequent legislation in the nature of a police regulation. *State ex rel. v. Pub. Serv. Comm.*, 452.

CANCELLATION AND REFORMATION.

1. **Of Deed: Undue Influence: Parent and Son: Burden of Proof.** The simple relation of parent and child is not sufficient to justify the cancellation of a deed or lease from the parent to the son, but in order to authorize such cancellation there must be a further showing of the exercise of undue influence by the son, or the existence of fraud practiced upon the parent by him, or that some advantage was taken by the son of the parent's weak condition of mind; and where there is no evidence tending to show any relation of trust and confidence between the parent and son except that which exists between parent and child, the burden of showing fair dealing and the absence of undue influence does not shift to the son in her suit to set aside a conveyance of her farm to him. *Smith v. Smith*, 405.
2. ———: ———: ———: **Utmost Fairness.** Where the evidence shows that the utmost fairness characterized the dealings of a son with his mother and manifests a desire on his part to secure to her an adequate income from her farm, which she, because of old age and physical infirmities, was unable to operate, and to preserve the estate intact for himself and her other children, and further shows that, in pursuance to said desire, he took upon himself a burden that he alone of all her children was able to carry, which required the advancement of considerable sums of money and his personal attention for ten years or more before he could be reimbursed, there is no room for the contention that, in her suit to set aside the conveyance, the burden of showing fair dealing and the absence of undue influence shifted to him. *Ib.*
3. **Conveyance: Incapacity of Grantor: Expert Testimony: Exploded by Her Own.** In a suit to cancel a deed and lease made by a mother to her son, testimony of the mother at the trial, eight months after the instruments were executed, in which she clearly relates the conversations and agreement between herself and the son at and prior to their execution, is of itself sufficient to explode the testimony of medical experts to the effect that at the time the instruments were executed she was of unsound mind and incapable of entering into such contractual relations. *Ib.*

CANCELLATION AND REFORMATION—Continued.

4. **Conveyance: To Several Children: Acceptance by All.** Where the mother did not write in her deed to her children, intended as an advancement to each of them, that it should be void unless all of them accepted it, the law will not imply a condition of defeasance in case one or more of them fail to accept it; but as to the grantee to whom it was delivered and as to those who do accept it, it will be a valid conveyance, and as to those only who refuse to accept it will it be held void. *Smith v. Smith*, 405.
5. ———: ———: **Lease: Ratification.** Where a voluntary deed to a farm by a mother to her children was made subject to a cotemporaneous lease to one of them for ten years at an annual rental, her demand and acceptance of a part of the rental is an affirmance of the contract with said grantee and lessee, subject to the correction of mutual mistakes, and cannot be avoided as to him because four of the six children refused to accept the deed. *Ib.*
6. **Deed: Lease: Mutual Mistakes: Reformation.** Where the agreement between a mother and her son was that her farm should be leased to the son for ten years at a named annual rental, and in addition he was to pay the taxes and make needed improvements on the dilapidated farm and pay the interest on two existing mortgages and advance her whatever sum above the rental was necessary for her comfort, and he was to be reimbursed for all said outlay above the annual rental by an extension of said lease at the same rental for such a time as would reimburse him, and that a deed should be made to all her children as equal grantees, subject to said lease, and said agreements were not incorporated in either of said cotemporaneous instruments, and the son, in his answer to the mother's suit to have the deed and lease cancelled, asserts that such were the agreements and prays that the instruments be reformed to include them, the court should reform the deed so to make it subject to the lease and the mother's life estate, and reform the lease so as to extend it for such period as will meet the other terms of the agreement. *Ib.*

CARBONATED WATERS. See **Inspection.**

CERTIORARI.

1. **Action On Insurance Policy: Waiver: Authority of Agent: Facts upon Certiorari.** Upon *certiorari* to the Court of Appeals, in which it was ruled that the defendant insurance company was charged with whatever knowledge was acquired by its inspector a few weeks after the policy was issued, it will not be held by the Supreme Court that the facts shown in evidence were not sufficient to establish such knowledge or the inspector's authority to waive any concealment by the insured of the true ownership of the insured property, where, upon the partial facts recited in the opinion of the Court of Appeals, no ground for quashing its judgment appears, the entire evidence being presumably before the Court of Appeals, and only such portions of it can be considered by the Supreme Court as appear from its opinion. *State ex rel. Ins. Co. v. Reynolds*, 382.
2. **To Court of Appeals: Evidentiary Facts.** In *certiorari* to a court of appeals based on conflict with prior decisions, the Supreme Court takes the evidentiary facts stated in the opinion of the Court of Appeals as the facts of the case. Where it is stated in said opinion that "there was evidence tending to show that the speed of the

CERTIORARI—Continued.

train was not slackened until after deceased was struck" the Supreme Court will assume that said statement is true, although an examination of the testimony might weaken the conclusions of law reached by that court. State ex rel. Frisco Railroad v. Reynolds, 479.

3. **Negligence: Crossing Railroad: Danger Zone: Humanitarian Rule.** The railroad ran east and west, and for about a half mile west of the station the double tracks were straight; north of them was the station house or waiting room, and south of them was a platform where passengers boarded east-bound trains; deceased, two other ladies and two children were in the station awaiting the arrival of a local train, due to stop at 9:45 a. m., but late; at about ten o'clock a through-passenger train, not scheduled to stop at the station and running several hours late and at the rate of forty-five miles per hour, approached from the west, and hearing its whistle these five persons, supposing it to be the local train, left the station and started across the tracks for the platform, and two of the women and the two children got across, but deceased, who was just behind the others, was struck just as she stepped off the south rail of the south track; a second or two more and she would have reached a place of safety. When the train was 1320 feet west of the station, the engineer saw this group of five persons leave the station and start across the tracks, and realizing they were attempting to cross he gave the brakes a "service application," which is the ordinary method of stopping a train as distinguished from an "emergency application," which slows up and stops it more quickly and which, if it had been given, would have stopped the train within the 1320 feet. The acts of the parties indicated to the engineer that they knew the train was approaching, which carried with it knowledge of the fact that it was approaching very rapidly. *Held*, that the engineer had a right to assume that deceased would stop before entering upon the south track, and the five persons were not passengers from the time they left the station, but, as to this non-stopping through train, the danger zone began, not at the doors of the station, but, practically, with the south track; and, the Court of Appeals, in ruling that the five persons were passengers from the moment they left the station for the purpose of boarding what they supposed was the local train and that it was the duty of the engineer from that moment to do everything he reasonably could have done to stop or slacken the speed so as to prevent the accident, contravened *Boyd v. Railway Company*, 105 Mo. 371, and later cases, and its opinion is therefore quashed. The deceased was guilty of contributory negligence, and there was nothing in the facts which brings it within the range of the humanitarian rule. *Held*, by WALKER, J., dissenting, that the facts of the case of *Boyd v. Railway Company*, 105 Mo. 371, are different from those in the instant case, and that the ruling of the Court of Appeals does not contravene the decision in that case, and hence the writ of *certiorari* herein should be quashed. *Ib.*
4. **To Court of Appeals: Extent of Review: Error.** Upon *certiorari* the Supreme Court will not determine whether the Court of Appeals erred in the application of the law to the facts stated in its opinion, but will only determine whether, upon the facts, it announced some conclusion of law contrary to the last previous ruling of the Supreme Court upon the same or a similar state of facts. State ex rel. Calhoun v. Reynolds, 506.

CERTIORARI—Continued.

5. **To Court of Appeals: Appointment of Receiver: Jurisdiction Based on Facts.** If the Court of Appeals, in prohibition, erred in holding that the petition filed in the circuit court did not show jurisdictional facts sufficient to warrant the appointment of a receiver for a corporation, it erred in a matter of opinion, and the facts being not the same or similar to those in other cases decided by the Supreme Court, its opinion cannot be quashed on *certiorari*. *State ex rel. Calhoun v. Reynolds*, 506.
6. ———: ———: **Resignation of Officers: Prohibition: After Judgment Rendered.** Three individuals had been appointed receivers of a corporation, which owned fifty-one per cent of the capital stock of another corporation, whose directors and officers had resigned, and on the following day said three receivers applied for the appointment of a receiver for said other corporation, alleging in their petition their ownership of fifty-one per cent of its capital stock and the resignation of said directors and officers, and that because of their resignation its assets were in danger of being utterly wasted and dissipated, and that its assets were being subjected to attachment suits. The Court of Appeals, in a prohibition proceeding, held that the resignation of the officers and directors did not create such a condition of extreme necessity as called for the appointment of a receiver on the next day after their resignation, and that the petition did not demonstrate that the petitioners had no other adequate remedy, and that therefore the circuit court, under the circumstances and in view of the allegations, had no jurisdiction to appoint the receiver. *Held*, on *certiorari*, that the facts, as stated in the opinion of the Court of Appeals, are in no way analogous to the facts of the cases of *State ex rel. v. Shields*, 237 Mo. 329, and *State ex rel. v. Mills*, 231 Mo. 493, and its opinion did not contravene the ruling in those cases. *Held*, further, that, although the Court of Appeals, by its judgment, may have interfered with the action of the circuit court, after that court had determined and assumed jurisdiction upon the facts before it, nevertheless, it cannot be said, because of the dissimilarity of the facts in this and other cases, that there is a contrariety of opinion. *Ib*.
7. ———: ———: **Resignation of Corporate Officers: The Price Case.** It was not ruled in the case of *Price v. Trust Co.*, 178 S. W. 745, that a court of equity has jurisdiction to appoint a receiver for a corporation which has no officers or directors where its property is threatened with waste or sale or dissipation, but what was there said at page 749 was either *obiter* or made *arguendo*; but even if it had been there so ruled, the opinion of the Court of Appeals in the instant case would not conflict therewith, because the facts involved are not similar. But it was ruled in the *Price Case* that the appointment of a receiver is not the only *desideratum* in any case, but is only ancillary to some other action having some definite relief in view, and the petition filed in the circuit court in the instant case, as epitomized in the opinion of the Court of Appeals, discloses that the appointment of a receiver was the only *desideratum* contemplated. *Ib*.

CITIES.

1. **Notice by Publication: Two Consecutive Weeks.** The statute required that the resolution authorizing a street improvement should be published in some newspaper "for two consecutive weeks; and if a majority of the resident owners of the property liable to taxation therefor shall not, within ten days from the date of the last

CITIES—Continued.

insertion of said resolution, file with the city clerk their protest against such improvement, then the board of aldermen shall have power to cause such improvements to be made and contract therefor." The resolution was adopted on May 3rd, and was published in a weekly newspaper on May 7th and 14th, and on May 25th an ordinance requiring the improvement to be made and the contract to be entered into was adopted. *Held*, that the statute required that the resolution should be published for full two weeks, or fourteen days, and as ten days intervened between its last publication on May 14th and the adoption on May 25th of the ordinance requiring the improvement to be made and the contract to be let, the requirements of the statute were met. Where the statute requires the resolution to be published for "two consecutive weeks," and allows property owners ten days thereafter in which to protest, it is not necessary, in order to constitute two consecutive weeks, that the resolution be inserted for three weeks in the weekly newspaper, but where the resolution is inserted the second time ten days before the council passes an ordinance authorizing the improvement, that is sufficient publication. [Overruling *Munday v. Leeper*, 120 Mo. 417.] *Brunswick ex rel. v. Benecke*, 307.

2. **Street Improvement: According to Established Grade: Specification.** A resolution adopted by the board of aldermen reciting that "the surface of the roadway when said work is completed shall be at the established grade thereof, all according to plans, profiles and specifications therefor filed by the proper officer with the city clerk of said city," and profiles, showing the cuts and fills necessary to bring to the established grade the part of the street to be graded and paved, duly filed, sufficiently comply with the requirements of the statute (Sec. 9411, R. S. 1919) requiring the resolution to include and describe the work of bringing the street to the established grade. *Ib.*
3. ———: **Notice to Begin Work: Waiver: Completion of Work.** Where the ordinance provided that the street improvement should begin within one week from the delivery to the contractor of written notice, said notice can be waived, and where no notice is given the time for completing the work is to be counted from the date he actually began work. *Ib.*
4. ———: **Not Completed Within Required Time: Void Tax Bill.** Where the ordinance provided that the street improvement should begin within one week from the delivery to the contractor of written notice, and be fully completed within sixty days, and no notice was given, but he began work on June 28th and completed the improvement on November 10th, a period of 135 days, no extension being granted or requested, the tax-bills issued to the contractor in payment for the improvement were void. *Ib.*
5. ———: ———: **Provisions for Interference.** Time is of the essence of a contract requiring a street improvement to be completed within a specified time, and material; and where no cause appears for the delay and for aught that appears the work was needlessly delayed, any provision in the contract that days lost on account of injunction suits, bad weather and strikes should not be counted, not being invoked or if invoked wholly inapplicable, does not relieve against the requirement for a completion of the improvement within the prescribed time. *Ib.*

CITIES—Continued.

6. **Dedication of Street: By Grantor's Conveyance.** A dedication of a street to public use may be made in a deed from one individual to another, if sufficiently explicit in terms to indicate the grantor's purpose. Where the owner sells property within the limits of a city, and in the deed bounds it by certain designated streets, not only does the grantee acquire an easement by the grant, but the deed constitutes an offer of the use declared. *St. Louis v. Clegg*, 321.
7. ———: ———: **Call For Street: Estoppel: Available to Public.** While the rule is that an estoppel by deed, including an implied covenant, can operate only in favor of the grantee or his privies in estate, and estopped *in pais* can operate only when representations have been made to a legal person, who has relied upon them to the extent that it would be inequitable to allow them to be withdrawn, a call for a street in a deed from one individual to another is more than a mere description, for it is an implied covenant that there is such a street, and where such individual has accepted the deed and acted on it in reliance upon such covenant the general public can avail itself of an estoppel in his favor. *Ib.*
8. ———: ———: ———: **Aided by Other Facts.** A deed from the owner of land in a city to an individual grantee designated Glades Avenue as the northern boundary of the property sold and ended the description by metes and bounds as "on the south line of said avenue;" ten days thereafter a survey, made twenty years previously by the grantor's husband, which declared Glades Avenue to be the northern boundary of the property and designated it as a proposed highway, was filed, and the presumption is reasonable that it was filed at said owner's instance; said survey remained on record unchallenged for seven years before the suit was brought to open and widen said avenue, and the grantee in said deed testified that Glades Avenue had been open for more than ten years and that he had several times driven through it. *Held*, that the deed, aided by the other facts, constituted a dedication to public use of that portion of the owner's property designated therein as Glades Avenue, and a formal acceptance was unnecessary. *Ib.*
9. ———: ———: **Subsequent Revocation.** After the dedication of land to a public use by the deed of the owner, an agreement between the owner and grantee, in which the former, for a consideration, agrees to sell to the latter ground described in the deed as a street, will not effect a revocation of the grant, nor be construed as indicative of another purpose than that expressed in the deed. And after the dedication has become absolute, the grantor cannot change its character by a deed of another lot to another grantee in which she describes the avenue so dedicated as a private street. *Ib.*
10. ———: **Fee in Dedicator.** The fact that at common law the fee in the soil over which a public highway is established remains in the owner does not affect its common law dedication to public use, which is absolute until the highway is vacated. *Ib.*
11. ———: **Opening Street: Damages.** Where the owner of property has parted with the fee, she is not entitled to damages for its appropriation by the city in a proceeding to open and widen a street over the same. *Ib.*

CITIES—Continued.

12. ———: **Nominal Damages.** Where the area included within a proposed public street is burdened in favor of adjacent lots with easements in the nature of a street, public or private, the owner, upon condemnation for the formal establishment of a highway thereon, is entitled to recover only nominal damages. *Ib.*
13. **Boulevard: Shifting Cost by Widening Street: Cancellation of Tax Bills: Corruption.** Charter provisions requiring the expense of opening a boulevard to be borne in part by the city and in part by property abutting thereon cannot be evaded by the enactment of an ordinance for widening a street but in fact establishing a boulevard, and thereby shifting the city's part of the expense of its construction upon property not subject to assessment for boulevard purposes; and where the city's part of such expense has by the subterfuge of enacting a widening ordinance been shifted to property not abutting on the street and therefore under the charter not subject to assessment to pay the cost of constructing a boulevard in such street, the owner of such property may maintain a suit to cancel the tax bills; and such a suit may be maintained without an allegation or showing that there was bribery or corruption in connection with the enactment of the widening ordinance and the proceedings thereunder. [Following *Albers v. St. Louis*, 268 Mo. l. c. 357 et seq.] *Albers v. St. Louis*, 543.
14. ———: ———: ———: **Notwithstanding Judgment in Condemnation: Collateral Attack.** Notwithstanding the fact that the circuit court had rendered judgment in the condemnation proceeding establishing the boulevard and approving the assessments against the owner's property, such owner can maintain a suit to cancel the tax bills issued to pay such assessments, if they were made contrary to charter provisions. *Ib.*

COCA COLA. See *Inspection*.

CONFLICT IN DECISIONS. See *Certiorari*.

CONSTITUTIONAL LAW.

1. **Election Ballots: Evidence in Criminal Prosecution: Constitutional Provision: Power of People.** The people have power, by a constitutional provision, to prohibit the use of ballots cast at an election as evidence in a criminal prosecution, and if they have so prohibited their use no argument to the effect that the Constitution should not be permitted to stand in the way of a prosecution for crime can be indulged by the courts. *In re Oppenstein*, 421.
2. ———: ———: ———: **Governmental Policy: Province of Courts.** The question whether election ballots can be used as evidence in a criminal prosecution was determined by the convention which framed the Constitution and by the people who adopted it, and with that policy the courts have nothing to do. The whole power of the courts in reference thereto is to decide what policy was adopted, and if the policy is written in the Constitution, whether good or bad, the courts will not displace it and substitute another. *Ib.*
3. ———: ———: **Secrecy.** The proposition that a simple provision in the Constitution that "elections shall be by ballot" introduces absolute secrecy, is established by the decision of the courts, the views of text-writers, and the history of the origin of voting by ballot and the nature of the evils it was intended to remedy. *Ib.*

CONSTITUTIONAL LAW—Continued.

4. **Election Ballots: Constitutional Provision: Secrecy: One-Sided Policy.** At the time the Constitution of 1875 was adopted, it was settled beyond doubt that election by ballot meant an election by secret ballot; and the question of policy was not one-sided, but the convention made choice between policies, and the choice is expressed in Section 3 of Article VIII of the Constitution the people adopted. In re Oppenstein, 421.
5. ———: ———: **Constitutional Provision: Modification: Election by Ballot.** Words used in the Constitution cannot be modified or affected by anything outside of the Constitution; they cannot be changed by the Legislature or the courts or by any other than the people. The words of the first clause of Section 3 of Article VIII that "all elections by the people shall be by ballot" had a definite and settled meaning when they were written into the Constitution, and if they stood alone and unqualified by other words therein it would have to be ruled that ballots cast or counted at an election cannot be used in a criminal prosecution. *Ib.*
6. ———: ———: ———: **Secrecy: Removal by Numbering.** The provision in the Constitution requiring the ballots to be numbered removes the veil of secrecy to some extent, but does not destroy it entirely; it does not uncover the ballot of any voter, nor does the provision authorize any action by any one which would, of itself, disclose the character of the ballot. *Ib.*
7. ———: ———: ———: ———: ———: **Comparing Ballots.** Except in cases of contested elections, no permission is given by the Constitution to compare the ballots with the list of voters; and the fact that such permission is expressly given in election contests is no reason for saying that such a comparison may be made in proceedings which are not election contests, such as a criminal prosecution growing out of alleged frauds at an election. *Ib.*
8. ———: ———: **Election Officers: Permission to Testify: Ballots as Evidence: Wisdom.** Section 3 of Article VIII of the Constitution permits election officers to testify in judicial proceedings concerning the way in which a voter voted, but that provision has nothing to do with the use of the ballots in evidence. And the use of the ballots cannot be authorized on the theory that it is absurd to permit such secondary evidence and exclude the primary evidence, for the question is not the wisdom or consistency of the provisions, but what they declare. *Ib.*
9. ———: ———: **Comparison in Contests: Inapplicable to Other Proceedings.** The proviso that "in all cases of contested elections, the ballots cast may be counted, compared with the list of voters, and examined under such safeguards and regulations as may be prescribed by law," does not authorize the use of ballots in proceedings other than cases of contested elections. It has no pertinence to any proceeding except cases of election contests, and cannot be extended to such other proceeding. The proviso does not of itself expressly prohibit the use of ballots in other proceedings, yet the very fact that special provision was deemed necessary in cases of election contests makes applicable the well known canon of construction that *expressio unius exclusio alterius est*. *Ib.*
10. ———: ———: ———: ———: **As Interpreted by the Constitutional Convention.** That the proviso to Section 3 of Article VIII of the Constitution does not apply to judicial proceedings is further made

CONSTITUTIONAL LAW—Continued.

plain by a rejection of the Constitutional Convention, by a vote of 42 to 23, of a proposed substitute which declared that "all ballots shall be subject to inspection and examination in all cases of contested elections and judicial proceedings." *Ib.*

11. ———: ———: **Ballots as Evidence: Statutory Authority.** In so far as a statute (Sec. 5403, R. S. 1919) conflicts with the Constitution it is without force, for the Legislature has no authority to authorize what the Constitution prohibits. *Ib.*
12. ———: ———: ———: ———: **Primary Elections.** Section 3 of Article VIII of the Constitution does not apply to primary elections, and the Legislature is not restrained by said section from enacting a law pertaining to them. *Ib.*
13. ———: ———: ———: **Exposure by Contest: Vote for Other Officers.** Where other officers were voted for in the municipal election, and in a contest instituted for the office of mayor a comparison of the ballots with the lists of voters is being made, it is unlawful to make public how said voters voted for such other officers, and if their ballots have thereby been exposed and the veil of secrecy destroyed it would be still further unlawful to use them as evidence in a criminal prosecution. *Ib.*
14. ———: ———: ———: **Statutory Prohibition.** Section 5403, Revised Statutes 1919, declaring that ballots shall "in no way be used or any information disclosed that would tend toward showing who voted any ballot," while invalid in so far as it relates to cases of election contests, is not otherwise prohibited by the Constitution, and forbids the use of ballots as evidence in a criminal prosecution. *Ib.*
15. ———: ———: ———: **Governmental Policy: Power of Courts.** If the State of Missouri has tied her hands by her Constitution, it is not within the power of the courts or of the Legislature to untie them. Furthermore, if one court can open ballot boxes in any proceeding other than an election contest, all courts can do likewise and the ballot would no longer be a secret ballot. *Ib.*
16. **Railroad Corporations: Issuance of Bonds: Property Right.** The provision of a railroad company's mortgage, covering all present and subsequently acquired properties, that, upon making future extensions and improvements, it could issue other bonds equal to eighty per cent of the value thereof, upon a showing that its net earnings for twelve months had been equal to twice the interest on its existing indebtedness, is a property right, and cannot be destroyed by any unreasonable subsequent legislation in the nature of a police regulation. *State ex rel. Ry. Co. v. Pub. Serv. Comm., 452.*
17. ———: ———: **Delayed by Failure to Earn Interest: Power of Public Service Commission: Mandamus.** Section 57 of the Public Service Act forbids the Public Service Commission from granting authority to a railroad corporation to issue bonds to cover expenditures that have been incurred more than "five years next prior to the filing of an application with the Commission for the required authorization." Relator had executed a mortgage upon all its existing and after-acquired properties, which contained a provision that it could thereafter issue bonds to the extent of eighty per cent of its subsequently acquired properties, extensions and

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betterments, upon a showing that its net earnings for the previous twelve months were equal to twice the interest on its existing indebtedness. The extensions and betterments had been made more than five years before it applied to the Commission for authority to issue bonds to the extent of eighty per cent of their value, but the application had been delayed because the earnings had not equalled twice the annual interest charges until a short time before the application was made, and the application was denied because it was not made within five years after the expenditures were incurred, and the company brings mandamus to compel the Commission to grant the authorization. *Held*, that the five-year limitation in the statute was an impairment of the company's contract right to issue the bonds, and for that reason unconstitutional and void, unless it can be sustained on the ground that it is a reasonable police regulation, and it can be sustained on that ground only when it is shown to be in the interest, protection and promotion of the public good; and the facts do not make it apparent that the public good will in any wise be promoted by withholding from the company authority to issue the bonds, and the Commission is commanded to approve their authorization.

Held, by DAVID E. BLAIR, J., dissenting, that, the statute being void, the Supreme Court has no authority, by mandamus or otherwise, to compel the Public Service Commission to approve the authorization nor could the Commission prohibit the company from issuing the bonds; the statute having been declared void in its application to the company, the Commission has no jurisdiction to further consider the subject. *State ex rel. Ry. Co. v. Pub. Serv.*

18. **Deceptive Words.** A legislative act is not made an inspection law by the frequent use of the word inspection; mere words do not determine its character, but that is to be ascertained from the language employed, the legislative intention indicated by such language, and the object and purpose of the act considered as a whole. *Coca Cola Bottling Co. v. Mosby*, 462.
19. **Carbonated Waters: Grounds for Inspection.** The extensive manufacture and general use of carbonated waters, commonly known as "soft drinks," and other like preparations having no merit other than the creation of a pleasant but fleeting gustatory sensation, are the moving cause of legislation providing for their inspection. *Ib.*
20. **Police Regulation: An Inherent Legislative Power.** The police power is inherent in the State as a sovereignty, and needs no organic grant for its exercise by appropriate legislation. It can always be used in the interest of the general welfare to restrain one man from so using his property as to injure another. *Ib.*
21. —: **Inspection Laws: Police Regulation.** Laws providing for the inspection of foods and drinks, if they relate to the purity of the article inspected and are designed to promote the public health by prohibiting the use of deleterious substances in their preparation, are the exercise of the police power. A prohibition may be placed by law upon the making and sale of any article deleterious to the user, and that may be accomplished by a reasonable inspection law. *Ib.*
22. —: **Inspection or Revenue Act: Provisions.** An act providing for the inspection of carbonated waters which defines the duties of an official who is charged with its execution, provides specifically

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for the products to be inspected, prohibits the manufacture and sale of such products as are not pure and wholesome, requires samples of such products to be submitted for inspection, requires labels showing the nature of the beverage and that it has been inspected as to character and purity to be placed upon all packages, prescribes a penalty for the misuse of the labels and for the failure of the inspector to perform his duties, prescribes the fees for inspection and directs that records of the inspection work shall be kept, is an inspection measure, whose purpose is to promote the public health, and, unless it can be shown that its operation is onerous and the result of its enforcement alien to the purpose of its enactment, will not be held to be a mere revenue measure, that a reasonable exercise of the police power. Ib.

23. **Title: Inspection Law.** The title to an inspection law need not expressly show that it is not a revenue measure. Section 28 of Article 4 of the Constitution does not require that the title of an act shall particularize the items it contains or does not contain. It simply means that the title shall unmistakably indicate the contents of the act. Ib.
24. **Inspection: By Sample.** Inspection of carbonated waters by sample, instead of the entire product, does not render the law invalid as a police regulation. Ib.
25. ———: **No Penalty for Manufacture.** An inspection law which affixes a penalty to the sale of an article unless it has been inspected and labeled is not invalid because it prescribes no penalty for the manufacture of impure products. It is the sale of impure products that the law strikes at, for it is by their sale that injury to the public is made effective. Ib.
26. ———: **Excessive Fees: Revenue Measure.** Inspection fees are not restricted to the mere expense of the inspection. It is impossible for the Legislature, in enacting an inspection law, to determine the exact expense of its execution or to nicely gauge the charge that should be required. What is a reasonable fee depends largely upon the sound discretion of the Legislature. An inspection law will not be held to be a revenue measure merely because in the first years of its operation the fees collected amount to more than three times the expenses; especially should this be the ruling where the Legislature, after discovering such excess, made very substantial reductions in the fees to be thereafter charged. Ib.
27. ———: ———: **Presumption of Legislative Reduction.** An inspection law being otherwise valid and the amount of the fees to be charged being largely within the sound discretion of the Legislature, the presumption is that the Legislature, upon discovering that the fees authorized to be charged and collected largely exceed the probable costs of inspection, will reduce the fees, and the courts do not interfere, immediately upon application, upon a showing that the fees collected for the first two years after the enactment of the law largely exceeded the expense. Ib.
28. **Legislative Enactment: Referendum: Power of Legislature to Prevent.** The General Assembly cannot prevent the reference of a legislative act to the people by referendum petition for their approval or rejection, by inserting in the act a section that the enactment is necessary for the immediate preservation of the public

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peace, health and safety, when it is not such in fact, nor by inserting such words in the act inhibit the court from determining whether it is subject to reference. [Per WOODSON, J.; JAMES T. BLAIR, C. J., and WALKER, GRAVES and ELDER, JJ., concurring; HIGBEE and DAVID E. BLAIR, JJ., dissenting.] State ex rel. Pollock v. Becker, 660.

29. **Constitutional Provision: Adopted from Another State: Interpretation Also Adopted: Exception.** The general rule, general in that it is the frequent expression of the courts, is that where a statute or constitutional provision has been borrowed from another state, which prior to its adoption in the borrowing state had received a construction by the highest court of that state, the presumption is that the borrowing state adopted it in the light of such construction; but this is only a rule of construction, and there are exceptions to it as ancient as the rule itself, one of which is that where the courts of the adopting state are clearly of the opinion that the construction by the courts of the initial state is erroneous, or that its application would lead to a denial of a substantial right, such foreign construction will not be controlling. [Per GRAVES, J.; BLAIR, C. J., and WALKER, J., concurring.] *Ib.*
30. **Referendum: Ousting Justice of Peace.** A legislative act which removes eight justices of the peace in one city, cuts down the number of justices and constables and provides for the appointment of others by the Governor, is not a bill for the immediate preservation of the public peace, health or safety, nor, as is shown by current history, of which the courts take judicial notice, were they enacted for any such purpose. And it is against all reason that the reference of such acts to the people can be prevented by inserting in them a section declaring that their enactment is necessary for the immediate preservation of the public peace, health and safety. [Per GRAVES, J.; BLAIR, C. J., and WALKER, J., concurring.] *Ib.*
31. —: **Exception: Exercise of Police Power: Judicial Question.** The clause of the Constitution which does not require a reference of legislative acts necessary for the immediate preservation of the public peace, health or safety is an exception to the otherwise universal reservation by the people of the power of referendum, and includes only those certain, definite and unquestioned phases of the police power which, in their very nature, may be and usually are emergent; and as the courts exercise jurisdiction to determine whether a legislative act is a valid exercise of the police power, it is also a judicial question whether a certain act, which attempts to cut off its reference to the people, is a valid exercise of the police power. [Per BLAIR, C. J.; WALKER and GRAVES, JJ., concurring.] *Ib.*
32. —: **Legislative Finding: Conclusiveness.** The Constitution does not say that a legislative act shall be exempt from the referendum if the General Assembly shall declare it to be necessary for the immediate preservation of the public peace, health or safety, but the exemption is made to depend on the fact that the act is so necessary. [Per BLAIR, C. J.; WALKER and GRAVES, JJ., concurring.] *Ib.*
33. —: **Exercise of Police Power: Judicial Question: Legislative Finding.** The question of fact whether a trade or calling is of

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such a nature as to render it subject to regulation or to particular regulations under the police power, is strictly a judicial question; and the court will hold invalid any legislative act which it finds does not touch the public good in such a way as to justify regulation of the calling or the particular regulation attempted, and it will do that in the face of the fact that the regulatory act involves a legislative finding that existing facts justify the attempted regulation. [Per BLAIR, C. J.; WALKER and GRAVES, JJ., concurring.] *Ib.*

34. ———: **Widening Police Power: Conclusiveness of Legislative Finding.** If a declaration in a legislative act that it is necessary for the immediate preservation of the public peace, health and safety is conclusive upon the courts, then the result is that Section 57 of Article IV of the Constitution empowers the Legislature to widen and extend the police power to include callings and regulations to which it could not have been extended prior to the adoption of said section, and to remove from the realm of judicial inquiry every question of fact pertaining to the scope and extent of a proper exercise of the police power; and, furthermore, it empowered the Legislature to defeat the reference of any and all bills, whether an attempted exercise of the police power or otherwise, by the mere inclusion of such a declaration in the bill, however false in fact it may be. [Per BLAIR, C. J.; WALKER and GRAVES, JJ., concurring.] *Ib.*
35. ———: **Legislative Error: Corrected by Another Error.** That part of said Section 57 pertaining to the reference to the people of laws enacted by the Legislature was designed to correct legislative errors; and if the Legislature errs by passing a bad act, it cannot cure that error by adding thereto another error, false on its face, that the act is necessary for the immediate preservation of the public peace, health and safety. [Per BLAIR, C. J.; WALKER and GRAVES, JJ., concurring.] *Ib.*
36. ———: **Legislative Finding: Effect Upon Referendum and Courts.** If a legislative declaration inserted in a law that its enactment is necessary for the immediate preservation of the public peace, health and safety is conclusive upon the question of its referendum and prevents its reference to the people, it would likewise be conclusive upon the courts when they are called upon to consider the validity of the act as a proper and reasonable exercise of the police power. It is conclusive neither on the referendum nor upon the court. [Per BLAIR, C. J.; WALKER and GRAVES, JJ., concurring.] *Ib.*
37. ———: **Police Regulation: Question of Fact.** Courts have power to pass upon questions of fact in determining whether police regulations are valid or invalid. [Per BLAIR, C. J.; Walker and GRAVES, JJ., concurring.] *Ib.*
38. ———: **Adopted from Oregon: Prior Construction.** The fact that the referendum provision of our Constitution was borrowed from Oregon, and that the highest court of that state had decided, before it was adopted here, that a declaration inserted by the Legislature in an act declaring that the enactment is necessary for the immediate preservation of the public peace, health and safety is conclusive upon the courts and prevents the reference of the act to the people by petitions sufficiently signed, will not compel the accept-

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ance of such construction by the courts of this State, because it is not in harmony with the spirit and purpose of our Constitution as declared in the initiative and referendum provision, and in such case the rule of foreign construction does not apply. The construction or the borrowed constitutional provision by the courts of the initial state is not binding, but only persuasive, and will not be followed where the courts of the adopting state are clearly of the opinion, as the Supreme Court is in this case, that such construction was erroneous and if followed will result in the denial of a substantial right. [Per WALKER, J.; BLAIR C. J., and GRAVES, J., concurring.] *State ex rel. Pollock v. Becker*, 660.

39. **Referendum: Purpose: Legislative Defeat.** The purpose of the referendum provision, expressed in an adopted constitutional amendment, was to provide an efficient method of checking and regulating legislative power, by providing that all legislative acts, except those necessary for the immediate preservation of the public peace, health and safety, may be referred to the people for their approval or rejection; and to hold that the Legislature may, in spite of the clear language used, determine, not only the extent to which the reserved power shall be used, but whether it may be exercised at all, would be to rule that the Legislature can violate the spirit of the provision and destroy its purpose. [Per WALKER, J.; BLAIR, C. J., and GRAVES, J., concurring.] *Ib.*
40. —: —: —: **Justice of Peace: Unlimited Exceptions.** If the Legislature may except from the operation of the referendum provisions of the Constitution acts abolishing justices of the peace, clerks and constables in designated townships and providing for the appointment of their successors, by simply declaring in the acts that their enactment is necessary for the immediate preservation of the public peace, health and safety, then a like exception may be effected by inserting said declaration in any act, regardless of the absurdity of its application, and thus the constitutional power intended to be reserved will be completely destroyed. [Per WALKER, J.; BLAIR, C. J., and GRAVES, J., concurring.] *Ib.*
41. —: **Justice of Peace: Public Peace, Health and Safety: Immediate Preservation: Absurdity.** Acts which apply to only one city in the State cannot be said to be "public" in the sense that word is used in the referendum clause of the Constitution; and if their purpose, as is apparent from their face, is to effect a change in the personnel in the offices of justices of the peace, clerks and constables in the townships of said city, and to define their duties and powers, it would be to violate reason, which is the life of the law, and to uphold an absurdity, to say they are necessary for the "immediate preservation" of the public peace, or the public health or the public safety, for those words imply an imminent danger, an impelling necessity, public disorders, and an unwholesome sanitary condition of the community at large. [Per WALKER, J.; BLAIR C. J., and GRAVES, J., concurring.] *Ib.*
42. —: **Legislative Acts: Presumption of Right Action: Invasion: Judicial Interference.** Every intendment should be made in favor of the propriety of legislative action; but it is firmly fixed in American government that it is the province and duty of the judicial department to say what the law is, and that duty is more imperative under modern constitutions which do not invest exclusive legislative power in the Legislature, but divide it between

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the Legislature and the people, and place upon the court, in a proper case, the duty to determine whether the Legislature's acts constitute an invasion upon the powers which the people in their Constitution have reserved to themselves. If a legislative act purports to be for the preservation of the public peace, health and safety, and its words and subject-matter have no relation to those subjects, and an analysis of it demonstrates that it is a palpable invasion of the powers reserved by the people, the courts will so decide, and preserve the constitutional right of referendum. [Per WALKER, J.; BLAIR, C. J., and GRAVES, J., concurring.] *Ib.*

43. ———: **Peace and Safety: Legislative Determination.** The mandate of the Constitution, coming directly from the people, is superior to the will of the Legislature; and while the Legislature, being invested with law-making power, must, in the first instance, decide whether an act is necessary for the immediate preservation of the public peace, health or safety, its determination that the necessity exists if in fact without substantial basis, is not final or conclusive. But if the act purports to have been adapted to meet an emergency which palpably, from its face, does not exist, it becomes the duty of the courts to take jurisdiction and give effect to the constitutional intent and purpose. [Per ELDER, J.; BLAIR, C. J., and WALKER and GRAVES, JJ., concurring.] *Ib.*
44. ———: ———: ———: **Construction by Oregon Court.** The ruling of the Supreme Court of Oregon, from which the initiative and referendum section of our Constitution was borrowed, that a declaration placed in a bill by the Legislature that its enactment is necessary for the immediate preservation of the public peace, health and safety is conclusive, is not binding upon the Supreme Court of this State, although such ruling was made before the constitutional section was adopted in this State. While such foreign construction is persuasive and entitled to respectful consideration, it is not binding, and will not be followed if the courts of the adopting state are of the opinion that it is erroneous. [Per ELDER, J.; BLAIR, C. J., and WALKER and GRAVES, JJ., concurring.] *Ib.*
45. ———: ———: ———: **Removal of Justice of Peace.** A declaration in a legislative act, abolishing in one township the offices of eight justices of the peace and constables, who from the record are presumed to be properly and efficiently discharging their official duties, and providing for the immediate appointment of other justices and constables, that its enactment is necessary for the immediate preservation of the public peace, health and safety, is not conclusive on the courts, and is not sufficient to prevent the reference of said act to the people for their approval or rejection. [Per ELDER, J.; BLAIR, C. J., and WALKER and GRAVES, JJ., concurring.] *Ib.*
46. ———: ———: ———: **Construction by Oregon Court: Binding.** When the people of Missouri adopted the referendum amendment from the Constitution of Oregon they adopted the construction which had previously been given it by the Supreme Court of that state just the same as if that construction had been written into the body of the amendment; and that court having ruled, prior to the adoption of the amendment in this State, that a declaration written into the body of a legislative act that its enactment is necessary for the immediate preservation of the public peace, health

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and safety is conclusive and final on the question of necessity, such ruling is binding on the courts of this State and compel a like ruling from them. [Per HIGBEE, J., dissenting.] *State ex rel. Pollock v. Becker*, 660.

47. **Referendum: Peace and Safety: Legislative Power: Coordinate and Independent Department.** The Constitution has solemnly vested the legislative power in the General Assembly, which is an independent and co-ordinate department of the government, answerable only to the people for the execution of the powers delegated to it, and the remedy for any abuse of that power, by fraud or trickery, is the ballot. Besides, a legislative act, which contains a section declaring that its enactment is necessary for the immediate preservation of the public peace, health and safety, may be submitted to the direct vote of the people by an initiative petition, so that there is no foundation for the suggestion that the Legislature, by inserting such a declaration in an act, may, by fraud and trickery, destroy the referendum or prevent legislation by the people. [Per HIGBEE, J., dissenting.] *Ib.*
48. ———: ———: **Oregon Construction.** When one state borrows a constitutional provision from another and the highest court of that state has authoritatively construed the provision prior to its adoption by such other, such provision is to be held as having been adopted with the construction thus previously put upon it. The initiative and referendum amendment to the Missouri Constitution was borrowed from the Constitution of Oregon, and the decision of the Supreme Court of that State, made before its adoption here, that a declaration in an act of the Legislature that its enactment is necessary for the immediate preservation of the public peace, health and safety is final and conclusive on the court, if not absolutely binding on the Supreme Court of Missouri, is persuasive authority of the highest character. [Per DAVID E. BLAIR, J., dissenting.] *Ib.*
49. ———: ———: **Weight of Authority: On Principle.** The decided weight of authority is to the effect that the existence of the necessity for a legislative act is a matter of legislative determination. But independent of decided cases, and on principle, the courts are and should be bound by the declaration in an act passed by the Legislature that its enactment is necessary for the immediate preservation of the public peace, health and safety. [Per DAVID E. BLAIR, J., dissenting.] *Ib.*

CONTRACTS.

Life Insurance: Suicide: Laws of California: Valid Provision. Where the substantive rights of the parties are governed by the laws of California, where the parties resided, the life insurance policy was made and delivered and the insured died, a provision in the policy that it should be void in case the insured committed suicide is valid, in a suit brought on the policy by the beneficiary in the courts of Missouri, there being no statute of California prohibiting or making void such a provision. *Parker v. Actna Ins. Co.*, 42.

CONVEYANCES.

1. **Testamentary Deed.** After the owner of land had signed and acknowledged a deed of gift in Illinois, conveying to her nieces her home in Springfield, Missouri, she handed it to one of them, saying, "You take this and put it in your box and keep it and when-

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ever anything happens you send it to Springfield and have it recorded," the words "whenever anything happens" being further elucidated by the witness as being understood by him to mean "when she died." *Held*, that, although by this delivery the maker may be said to have parted with dominion over the deed, her intention was that it should take effect upon her death; it was therefore testamentary in character, and did not pass a present interest in the property to the grantees. *Coles v. Belford*, 97.

2. ———: **Delivery: Intent.** In order to constitute a valid delivery the handing of a deed by the maker to one of the grantees must be done with the intent of passing an estate *in praesenti*, and if the giving of the deed into the hands of the grantee is not done with the intent of passing the title at the time there is no delivery in contemplation of law. *Ib.*
3. ———: **Retaining Possession.** Retention of the management and control of property after a deed of gift conveying it to nieces is signed, acknowledged and handed to one of them, paying taxes and making improvements upon it, receiving the rents and placing it in the hands of an agent to be sold, by the grantor, are evidence that it was not her intention that the deed should take effect and pass title as a present transfer. *Ib.*
4. ———: ———: **Self-Serving Evidence.** In a suit by heirs of the maker against the grantees to set aside a deed of gift, letters written by the grantor, after she had signed and acknowledged it, to a real estate agent, her banker and attorney, relating to the payment of taxes upon the property, the making of repairs and the sale thereof, are not merely self-serving statements, but competent cumulative evidence consistent with the oral testimony of the addressees who detail facts showing her continued exercise of control over the property and her intention that the deed was not to become effective until her death. Besides, the grantees, having admitted in their answer that the grantor continued to control the property after the execution of the deed, cannot be heard to complain of such letters. *Ib.*
5. ———: **Decree on Another Ground.** The decree of the trial chancellor cancelling and annulling a deed being correct will be upheld on appeal, although he reached that conclusion on the ground that the deed "was not executed and delivered," and the Supreme Court are of the opinion it was testamentary in character and therefore void. *Ib.*
6. **Patent Clerical Error: Recognition in Suit to Quiet Title: Omission of Word Quarter.** The recognition of a patent clerical error or omission in the construction of a deed is not a reformation of it; and where the judgment in a tax suit properly described the land as the southwest quarter and the northeast quarter of Section 36, and the sheriff's deed recites that the judgment described the southwest quarter and the northeast quarter of Section 36, and then says that named persons were the highest bidders for the "southwest quarter and northeast of Section 36" and that said last above described tracts were stricken off and sold to said named persons, it is clear that the omission of the word "quarter" after the word "northeast" was a patent clerical error, and that said deed, when read as a whole, conveyed 320 acres to said purchasers; and their subsequent grantee, in his suit to quiet title, is,

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- without bringing suit in equity to reform the deed, entitled to judgment for the 320 acres, and not simply to 160, as the trial court ruled. *Marley v. Land & Mfg. Co.*, 221.
7. **Acknowledgment of Married Woman: Statute of 1855.** Where the statute (R. S. 1855, ch. 32, sec. 39, p. 363) required that the certificate of acknowledgment of a married woman shall set forth "that she executed the same freely and without compulsion or undue influence of her husband," a certificate reciting that the married woman "executed and delivered the said deed freely and without compulsion of their said respective husbands" is sufficient, without using the words "undue influence." The statute requires no more than a substantial compliance with its terms, and is satisfied if the free and unconstrained consent of the wife to the deed is obtained. *Mathews v. O'Donnell*, 235.
 8. **Description: Reference to Grantor's Deed.** A conveyance by two married women and their husbands of "our undivided interest in a fractional piece of land deeded to us" by their grantor, "it being a part of the S. W. $\frac{1}{2}$ of the S. W. of Sec. 5, Twp. 50, Range 29," is a sufficient description, if the description of the land "deeded" to them by their grantor is sufficient. The office of a description is not to identify the land, but to afford the means of identifying it, and when this is done the description is sufficient. Where the grantors convey land deeded to them by a certain grantor and his deed to them had identified the tract, the description is sufficient. *Ib.*
 9. **——: Undivided Interest: Exclusive Possession of Grantee.** Where land had been conveyed to two married women, and they and their husbands conveyed "our undivided interests" therein, the meaning is clear enough. Especially where the grantee took and retained exclusive possession of the tract conveyed, for this itself cured any defect in the description. *Ib.*
 10. **To Woman and Her Children: Fee or Remainder: Cotenancy: Settlement.** A deed conveying certain land to "F. A. D. Mathews and all her children she has now or ever may have," with the *habendum* reading: "To have and to hold the same unto the said F. A. D. Mathews and her children as aforesaid and their heirs, but it is to be distinctly understood if the said F. A. D. Mathews may hereafter conclude to sell the above tract of land she is hereby empowered and authorized to do so by arranging it so that the proceeds of said land is to be laid out for other lands or property to be conveyed so as to put the right of title in the said F. A. D. Mathews and her children," did not convey the fee to said F. A. D. Mathews, but only a vendable life estate, with remainder in fee in her children, born and unborn. She and her children were not made tenants in common, for it is clear that the grantor did not intend that the children should take a present interest, for he does not name them, and says "all her children she has now, or may ever have;" but the grant, when read in connection with the *habendum*, manifests a settlement, with a life estate to the mother and the remainder in fee to her children. *Ib.*
 11. **Purchase from Fraudulent Grantor: Notice: Failure to Testify.** The burden of proving a bona-fide purchase from a fraudulent grantor is on the party pleading it, and to support the plea he must prove that he bought without notice, and paid the purchase money

CONVEYANCE—Continued.

without notice. And failure of such purchaser to testify creates an inference that he refrained because the truth would not aid his contention, and of itself affords strong evidence of the fraud. *Ib.*

12. **Married Woman's Deed: After-Acquired Interest.** Under the statute of 1855 (R. S. 1855, sec. 36, ch. 32, p. 363) the deed of a married woman who owned only a life interest in land did not pass her interests subsequently inherited from the remaindermen. Prior to the Married Woman's Act of 1889, only whatever interest a married woman had at the time was conveyed by her deed, whatever its form. *Ib.*
13. **Dedication of Street: By Grantor's Conveyance.** A dedication of a street to public use may be made in a deed from one individual to another, if sufficiently explicit in terms to indicate the grantor's purpose. Where the owner sells property within the limits of a city, and in the deed bounds it by certain designated streets, not only does the grantee acquire an easement by the grant, but the deed constitutes an offer of the use declared. *St. Louis v. Clegg*, 321.
14. **——: To Several Children: Acceptance by All.** Where the mother did not write in her deed to her children, intended as an advancement to each of them, that it should be void unless all of them accepted it, the law will not imply a condition of defeasance in case one or more of them fail to accept it; but as to the grantee to whom it was delivered and as to those who do accept it, it will be a valid conveyance, and as to those only who refuse to accept it will it be held void. *Smith v. Smith*, 405.

CORPORATIONS.

1. **Appointment of Receiver: Jurisdiction Based on Facts.** If the Court of Appeals, in prohibition, erred in holding that the petition filed in the circuit court did not show jurisdictional facts sufficient to warrant the appointment of a receiver for a corporation, it erred in a matter of opinion, and the facts being not the same or similar to those in other cases decided by the Supreme Court, its opinion cannot be quashed on *certiorari*. *State ex rel. Calhoun v. Reynolds*, 506.
2. **——: Resignation of Officers: Prohibition: After Judgment Rendered.** Three individuals had been appointed receivers of a corporation, which owned fifty-one per cent of the capital stock of another corporation, whose directors and officers had resigned, and on the following day said three receivers applied for the appointment of a receiver for said other corporation, alleging in their petition their ownership of fifty-one per cent of its capital stock and the resignation of said directors and officers, and that because of their resignation its assets were in danger of being utterly wasted and dissipated, and that its assets were being subjected to attachment suits. The Court of Appeals, in a prohibition proceeding, held that the resignation of the officers and directors did not create such a condition of extreme necessity as called for the appointment of a receiver on the next day after their resignation, and that the petition did not demonstrate that the petitioners had no other adequate remedy, and that therefore the circuit court, under the circumstances and in view of the allegations, had no jurisdiction to appoint the receiver. *Held*, on *certiorari*, that the facts, as stated in the opinion of the Court of Appeals, are in no way analogous to

CORPORATIONS—Continued.

the facts of the cases of *State ex rel. v. Shields*, 237 Mo. 329, and *State ex rel. v. Mills*, 231 Mo. 493, and its opinion did not contravene the ruling in those cases. *Held*, further, that, although the Court of Appeals, by its judgment, may have interfered with the action of the circuit court, after that court had determined and assumed jurisdiction upon the facts before it, nevertheless, it cannot be said, because of the dissimilarity of the facts in this and other cases, that there is a contrariety of opinion. *State ex rel. Calhoun v. Reynolds*, 506.

3. **Appointment of Receiver: Resignation of Corporate Officers: The Price Case.** It was not ruled in the case of *Price v. Trust Co.*, 178 S. W. 745, that a court of equity has jurisdiction to appoint a receiver for a corporation which has no officers or directors where its property is threatened with waste or sale or dissipation, but what was there said at page 749 was either *obiter* or made *arguendo*; but even if it had been there so ruled, the opinion of the Court of Appeals in the instant case would not conflict therewith, because the facts involved are not similar. But it was ruled in the *Price Case* that the appointment of a receiver is not the only *desideratum* in any case, but is only ancillary to some other action having some definite relief in view, and the petition filed in the circuit court in the instant case, as epitomized in the opinion of the Court of Appeals, discloses that the appointment of a receiver was the only *desideratum* contemplated. *Ib.*
4. **Fraud and Deceit: Sale of Stock: Fictitious Sale of Railroad.** Evidence that the president of a trust company sold its stock to plaintiff at \$190 per share with the assurance that its book value was \$200, at a time when the company was insolvent, the result of happenings through years, carefully concealed by fictitious and imaginary profits and the payment of dividends never earned; that the said president told plaintiff, prior to purchase of the stock, that the company had sold for subsequent delivery a railroad, financed and built by it, at a profit of one million dollars, whereas in fact he had only given an eighteen months' option on the road; and that this railroad was one of the chief factors in the ultimate wreck of the trust company, is sufficient, in an action of fraud and deceit, to submit to the jury the issue whether the sale of the stock to plaintiff was induced by the false representations of its president that the company was in a solvent and prosperous condition and the book value of its stock was worth what he said it was, these facts being sufficiently pleaded. *Morrow v. Franklin*, 549.
5. ———: ———: **Evidence: Value at Time of Sale: Subsequent History of Corporation.** In an action of fraud and deceit based on the fraudulent sale of the stock of a corporation at a false and fictitious value, the value of the stock at the date of the purchase is the value to be considered in determining the damages, but the subsequent history of the corporation and the conditions and rapid fall in the price of its stock thereafter may be shown as throwing light upon the value at the time of the purchase, especially where there was no radical change in the real assets and liabilities of the company during the subsequent months up to the time of its failure, and the defendant had in writing represented to plaintiff that he had "inside knowledge of the company's affairs." And such evidence being proper, it is not error to instruct the jury that the real value at the time of the purchase may be ascertained "in the light of the subsequent events in the history of the company." *Ib.*

CORPORATIONS—Continued.

6. ———: ———: **Presumptive Knowledge of Directors.** In an action for fraud and deceit brought against the president of a trust company for fraudulent representations in the sale of its stock, at a price far above par, at a time when it was in fact insolvent and its stock had been given a fictitious book value, it is not erroneous to instruct the jury that "it is the duty of a director of a trust company to ascertain the value of its assets and the amount and extent of its liabilities, and the law presumes that a director is familiar with the surplus and profits and the intrinsic value of its assets and the amount of its liabilities." The statute (Secs. 1131, 1133, R. S. 1909) imposes upon directors of trust companies the duty of knowing their exact status, and the law presumes that they perform that duty. Besides, in this case, such instruction, if technically erroneous, was harmless, because defendant in a letter to plaintiff, prior to the sale of the stock, said he had "inside knowledge of the affairs of the company." *Ib.*
7. ———: ———: **Trust Company.** It is the duty of directors of a trust company, made so by statute, to know its financial condition, the value of its assets and the extent of its liabilities at the time they offer its stock for sale, or induce others to buy it from other stockholders. *Ib.*
8. ———: ———: **Reliance Upon Statement of Directors: Access to Books.** A stockholder of a trust company, employed in its place of business, with a legal right to examine its books, has a right to rely upon the statements and representations of its officers and directors, and is not bound to examine the books for himself before purchasing its stock. *Ib.*
9. ———: ———: **Printed Circulars.** Directors of a trust company are liable to a purchaser of its stock for false representations of its financial condition contained in printed pamphlets and circulated with their knowledge for the purpose of inducing people to purchase. *Ib.*
10. ———: ———: **Representations of Fact.** Positive statements concerning the present or past earnings of a corporation, or the value of its stock, or the value and soundness of its assets, or the amount of its liabilities, made by its officers and directors, are not mere expressions of opinion, but representations of fact upon which a prospective purchaser of its stock has a right to rely. *Ib.*
11. ———: ———: **Measure of Damage.** The measure of damages, in an action of fraud and deceit, based on a sale of the stock of a corporation, induced by the false representation of its president as to its value, is the difference between the value it would have had if such representations had been true, and the real value at the time of the purchase. Nor is it error to instruct the jury that such real value may be ascertained "in view of the subsequent events in the history of the company" where the subsequent history of the company is properly admitted in evidence. *Ib.*

COTENANTS. See **Partition.**

COUNTY ENGINEER.

1. **Salary: For Ex Officio Duties Only.** The words of the statute (Sec. 10356, R. S. 1909) providing that in counties containing fifty thousand inhabitants, etc., "the county surveyor shall be *ex officio* coun-

COUNTY ENGINEER—Continued.

ty highway engineer, and his salary as surveyor and *ex officio* county highway engineer shall be not less than two thousand dollars and not more than three thousand dollars, as fixed by the county court," in view of the history of the statute preceding such proviso, has reference to *ex officio* duties and *ex officio* salary only; the proviso did not mean that the county court could fix the salary of the officer both as county surveyor and *ex officio* county highway engineer at less than the statutory salary of the surveyor, but the term "as surveyor and *ex officio* county highway engineer" had reference to the office of engineer, and not to that of surveyor. State ex rel. Koehler v. Bulger, 441.

2. **Salary: Amendment of 1919.** Likewise the amendment to such statute made in 1919 (Sec. 10787, R. S. 1919) providing that in such counties "his salary as surveyor and *ex officio* county highway engineer shall not be less than three thousand dollars and not more than five thousand dollars, as may be fixed by the county court," meant that the salary of the *ex officio* county highway engineer, for the performance of the duties of that office, should be not less than three thousand dollars, in addition to his salary as county surveyor. The statute did not mean that the court could fix his salary for the performance of the duties of both offices at not less than three nor more than five thousand dollars, but it meant that the court could fix his salary for his *ex officio* duties as highway engineer at not less than three nor more than five thousand dollars, and did not give the court power to fix his salary as surveyor at all. In such counties, he is entitled to at least three thousand dollars a year, in addition to his statutory salary as county surveyor. *Ib.*

COURTS.

1. **Election Ballots: Evidence in Criminal Prosecution: Governmental Policy: Power of Courts.** If the State of Missouri has tied her hands by her Constitution, it is not within the power of the courts or of the Legislature to untie them. Furthermore, if one court can open ballot boxes in any proceeding other than an election contest all courts can do likewise and the ballot would no longer be a secret ballot. In re Oppenstein, 421.
2. **Denial of Writ in Another Case.** The denial of a writ in another similar case by merely marking the word "denied" on the application cannot be considered as overruling previous decisions. Writs are frequently denied for reasons which do not arise out of substantive law. *Ib.*

CRIMINAL CONVERSATION. See **Alienation.**

DAMAGES.

1. —: **Injury to Feelings: Loss of Society.** The wife, in her suit for the malicious alienation of her husband's affections and separation from her, can recover damages for injury done to her feelings and the loss of the support, comfort and society of her husband. Hollinghausen v. Ade, 362.
2. —: **Duration of Damages: Separation and Divorce.** Where defendant caused plaintiff's husband to separate from her, she is entitled to damages from the time he separated from her, and not simply from the time she obtained a judgment of divorce from him, and not simply from the time he separated from her up to the time of the judgment for divorce. *Ib.*

DAMAGES—Continued.

3. **Joint Tortfeasors: Judgment Against One: Dismissal as to Other.** Where in a suit for damages for the alienation of the affections of plaintiff's husband, brought against his sister and her husband, as joint tortfeasors, the court at the close of the evidence sustained a demurrer offered by the defendant husband, and the jury brought in a verdict against the remaining defendant, in pursuance to instructions applicable to her alone, it was not error to permit plaintiff to dismiss as to the defendant husband and to enter a judgment of dismissal as to him, and to enter judgment against the defendant wife in accordance with the verdict. *Ib.*
4. **Fraud and Deceit: Measure of Damage.** The measure of damages, in an action of fraud and deceit, based on the sale of the stock of a corporation, induced by the false representation of its president as to its value, is the difference between the value it would have had if such representations had been true, and the real value at the time of the purchase. Nor is it error to instruct the jury that such real value may be ascertained "in view of the subsequent events in the history of the company" where the subsequent history of the company is properly admitted in evidence. *Morrow v. Franklin*, 549.

DEDICATION BY DEED. See **Streets.**

DENTISTS.

1. **Mandamus: Motion to Strike Out Parts of Return: Judgment on Pleadings: Irrelevant Matter.** In mandamus, where relator has filed a motion to strike out a portion of the return, which is taken with the case, the court, having overruled the motion, will proceed to consider the case upon a motion for judgment on the pleadings, but disregarding all irrelevant matter, whether it appears in the petition or return. *State ex rel. Wolfe v. Dental Board*, 520.
2. **Registration and License: Discretion of Board.** Under the Dental Act of 1917 (Laws 1917, p. 252 et seq.) the Missouri Dental Board has a discretion to grant or withhold a certificate of registration to an applicant therefor. But said certificate having been granted and recorded, the board has no discretion while it is in force to withhold the annual license when a request therefor and the payment of one dollar are made. Said act declares that an applicant who shall have received a certificate of registration showing that he is qualified to practice dentistry, upon request and the payment of one dollar to said board, shall be entitled to a license at the time the certificate is issued and annually thereafter. The applicant is not required to submit to an examination upon his application for an annual license, but his qualifications are determined by an examination given prior to the issuance of his certificate of registration, which vouches for his educational and moral qualifications, and the annual fee of one dollar for his license or a renewal thereof is nothing but a fee and serves no substantial purpose other than as a contribution to the secretary. [Overruling closing paragraph of opinion in *State ex rel. Wolfe v. Missouri Dental Board*, 282 Mo. l. c. 303, in so far as it indicates that any discretion is lodged by the statute in the board to withhold a license or a renewal license to an applicant whose certificate of registration is in force and pays the fee of one dollar.] *Held*, by JAMES T. BLAIR, C. J., dissenting, with whom DAVID E. BLAIR, J., concurs, that as Section 12636, Revised Statutes 1919,

DENTISTS—Continued.

expressly provides that the board may revoke a license "or refuse to grant a license" if the applicant has been guilty of the publication or circulation of any fraudulent or misleading statements as to the skill or method of any licensee or operator, or when a dentist advertises himself "as a practitioner without causing pain," the board may refuse to renew the license of a duly registered dentist who has been guilty of these things. *State ex rel. Wolfe v. Dental Board*, 520.

3. **Mandamus: Registration and License: Stare Decisis.** A mandamus suit brought in the Supreme Court to compel the Missouri Dental Board to issue a license to relator is not a second appeal, but a new case. But even on second appeal, after the case has been tried on the basis of the ruling on the first appeal, the court reserves the right to correct its former ruling. What was said in the former suit of *State ex rel. Wolfe v. Missouri Dental Board*, 282 Mo. 1. c. 303, to the effect that the board had a discretion to withhold an annual license to a registered dentist was an inadvertence, and related to the issuance of the certificate of registration, or to a trial for the revocation of the certificate and the license, and in so far as it may be understood as a holding that the board is invested with a discretion to withhold a license to a registered dentist should be corrected, and is corrected upon a full review of the whole statute. *Held*, by JAMES T. BLAIR, C. J., dissenting, with whom DAVID E. BLAIR, J., concurs, that the decision in the former case of *State ex rel. Wolfe v. Missouri Dental Board*, 282 Mo. 292, is well supported by Section 12636, Revised Statutes 1919, and is sound law. *Ib.*
4. —: **Invalid Revocation of Certificate: Refusal of License: Mandamus.** Where the order of the Missouri Dental Board revoking the certificate of registration of a dentist has been nullified by the Supreme Court, the board cannot thereafter refuse the applicant a license without a further hearing, and if it refuses to issue to him a license on the ground that said annulled order is still in force, it will be compelled by mandamus to issue to him a license annually so long as his certificate of registration is in force and he pays the annual license fee. *Held*, by JAMES T. BLAIR, C. J., dissenting, with whom DAVID E. BLAIR, J., concurs, that Section 12636, Revised Statutes 1919, authorized the board to "refuse to grant a license" to an applicant, though a duly registered dentist, who, since the attempt to revoke his certificate of registration, has been guilty of the things denounced by said section. *Ib.*
5. —: —: **Other Grounds for Withholding License.** The Missouri Dental Board cannot withhold an annual license from a duly registered dentist on the ground that his conduct has been unethical and otherwise in violation of the dental statutes, without first giving him a hearing; for, if authorized to exercise a discretion at all, the board must first hear and determine whether the applicant has violated the statutes and the court only passes upon the board's record, and a refusal to renew the license without a hearing would be arbitrary, and the board cannot arbitrarily refuse a license and then ask the court to adjudge him guilty of having done the things which the board in its return charges constituted a violation of the statutes. *Held*, by JAMES T. BLAIR, C. J., dissenting, with whom DAVID E. BLAIR, J., concurs, that Section 12636, Revised Statutes 1919, ex-

DENTISTS—Continued.

pressly authorizes the board to revoke a license "or to refuse to grant a license" if the applicant has been guilty of "the publication or circulation of any fraudulent or misleading statements" as to his skill or methods, etc.; and where the board in its return to the writ of mandamus specifically charges that relator, since its former order revoking his certificate of registration was nullified by the court, has been guilty of the things denounced by said statute and because of said violations it refused to renew his license, and he moves to strike out said part of the return as being irrelevant and said motion is taken with the case, and he thereupon files a motion for judgment on the pleadings, thereby admitting said charges and a subsequent violation of the law, the writ should not be made permanent, but relator's admissions show that the board did its duty when it refused to renew his license. *Ib.*

DIVORCE.

1. **Estoppel by Judgment in Alienation Suit.** A judgment for divorce, in an action brought by the wife against her husband, to which he made no defense, determines the status of the parties to it, but is not conclusive upon strangers as to the facts in said suit litigated, and does not operate as an estoppel in a suit by the husband against the seducer of the wife for criminal conversation and the alienation of her affections, even though her petition in the divorce suit alleged as one ground for divorce that her husband had charged her with adultery with the said seducer. The seducer not having been a party to the action for divorce, a judgment for the wife therein was not such an adjudication that the seducer had not committed adultery with the wife as estops the husband from maintaining an action for damages against the seducer for alienation and criminal conversation with the wife prior to the time the divorce judgment was rendered. *Pollard v. Ward*, 275.
2. ———: **Petition and Judgment as Evidence.** But the petition and judgment in the wife's suit for divorce brought against the husband, in which she alleged as a ground therefor that he had charged her with adultery with a certain man, are admissible in evidence in a subsequent action by the husband against such man for damages for alienating the affections of the wife, as admissions, even though the husband filed no answer in said suit, but they are admissible not as conclusive against him, but only as any other admissions which may go to the jury for what they are worth. *Ib.*
3. **Estoppel by Conduct.** The husband is not estopped by his failure to file an answer in the divorce suit brought by his wife, in which she alleged as one ground for divorce that he had charged her with adultery with a certain man, from maintaining an action for damages against said man for alienation and criminal conversation committed prior to the time the suit for divorce was instituted; for, even though it be conceded that the husband's conduct in the divorce suit in defaulting and failing to meet the wife's charge is inconsistent with his claim for damages in the alienation suit, two necessary elements of estoppel *in pais* are lacking, namely, the defendant did not act upon the faith of the husband's conduct in the divorce suit, for his criminality with the wife occurred before that suit was brought, and, second, the defendant is not injured in any manner by the husband's failure

DIVORCE—Continued.

to contradict or controvert the wife's charges in the divorce suit. *Pollard v. Ward*, 275.

4. **Estoppel by Property Settlement.** The fact that the husband in the divorce action brought by his wife paid his wife four thousand dollars as alimony and obtained from her a deed by which she conveyed to him her interest in property which he had acquired from her father, in no wise affects the defendant in the husband's suit for alienation and criminal conversation with the wife, and hence does not constitute estoppel. *Ib.*
5. **Evidence: No Objection.** Unless objection is raised to testimony at the time the witness states it, its competency will not be ruled on appeal. *Ib.*

DOWER.

1. **Unassigned Widow's Dower: Quarantine.** Upon the annulment of the will of a householder, his widow, to whom dower was never assigned, was entitled, as her quarantine, to the possession of the mansion house and the messuages thereto belonging during her life, and to all rents and profits thereof, as if no will had existed. And where the home place consisted of 210 acres, of which ninety acres was devised to a son and the balance to the widow for life, the widow, upon the annulment of the will, was entitled to the possession of said ninety acres, as well as to the balance of the homestead, and during her life, no dower having been assigned, none of the testator's heirs had any legal claim to the rents or profits thereof. *Byrne v. Byrne*, 109.
2. ———: ———: **Will Obtained By Widow's Undue Influence.** Although the appellate court sustained the verdict of the jury setting aside the will on the ground that it was the result of undue influence exercised by the widow upon the testator, she cannot be deprived of her dower and quarantine in the home place, for when the will was annulled the result was that the testator died without a will and intestate, and his heirs and widow were restored to their rights at law, and among the rights regained by the widow was her right to dower and quarantine. *Ib.*
3. **Homestead: Greater Than Dower: Conveyance: Re-marriage: Assignment.** Where the homestead was worth less than the statutory value and was all the land in which the widow was entitled to dower and she conveyed her "life interest" therein, her grantee became clothed with all her interest in the homestead, and of her alternate right to dower when she re-married, and of her right to quarantine until dower is assigned; and upon her re-marriage and the consequent extinguishment of her homestead, her rights of dower and quarantine remained unaffected, and her grantee may have dower assigned to him; but her homestead became extinguished upon her re-marriage, and the special statute of limitations began to run from that date, and her grantee must bring suit for the recovery of her dower within ten years or be barred. *Smith Bros. Land Co. v. Phillips*, 579.
4. ———: **Duration as to Minors: Re-marriage of Widow.** Under the Homestead Act of 1895 the homestead estate of minor children is limited to the joint right of occupancy with the widow, and at her death or re-marriage it passes to them by descent as if no homestead law existed. *Ib.*

DOWER—Continued.

5. ———: ———: ———: **Limitations.** The right of the widow to dower being assignable, and her homestead right being extinguished by her re-marriage, and the right to have dower assigned reviving upon the extinguishment of her homestead right, and the homestead estate of the minor children being limited to the joint right of occupancy with the widow, they are in possession after her re-marriage by right of inheritance from their father and not under the Homestead Act, and it is upon the date of her re-marriage that the right accrues to her or her assignee to have her dower admeasured and assigned, and the grantee in her deed, made after her husband's death and before her re-marriage, must bring his suit to have assigned and to recover her dower within ten years after her re-marriage, under the statute (Sec. 391, R. S. 1909) which declares that "all actions for the recovery of dower in real estate, which shall not be commenced within ten years after the death of the husband, through or under whom such dower is claimed or demanded, shall be forever barred." *Ib.*
6. ———: **Assignment of Dower: Limitations.** Where the homestead is all the real estate of which the husband died seized and does not exceed the statutory value or quantity, it is unnecessary to appoint commissioners to assign dower to his widow; but her deed conveys her dower and her re-marriage extinguishes her homestead right, and the right of her grantee to have her dower admeasured to him accrues on the date of her re-marriage, and becomes extinct in ten years thereafter. *Ib.*
7. ———: ———: ———: **Quarantine: Limitations.** The widow's quarantine, which is her right to remain in and enjoy the mansion house and the messuages and plantation thereto belonging, is an incident to the right to have dower assigned, and when that right ceases quarantine also ceases, and where her grantee is barred by limitations to recover her dower he is also barred to recover any supposed quarantine right. *Ib.*
8. **Homestead: Re-marriage: Limitations.** Where the widow conveyed her interest in the homestead property and then married again, her right to dower accrued on her re-marriage, and the right of her grantee to maintain suit to have assigned and to recover dower is barred in ten years after her re-marriage, and said grantee being barred her right to have her deed cancelled as fraudulent and to have dower assigned to her is likewise barred in ten years. *Smith Bros. Land Co. v. Phillips, 595.*
9. ———: ———: **Ejectment: Equitable Defense.** The widow conveyed her "life interest" in the homestead property, and then re-married, and more than ten years thereafter her grantee brought ejectment to have dower assigned and admeasured and to recover the same. To this action she, being in possession and all the householder's children having reached their majority, filed a cross-bill, alleging that her deed, made nineteen years prior thereto, was void for fraud perpetrated upon her by the grantee, and asking that said deed be cancelled, and claiming that she was entitled to exclusive possession by virtue of her statutory quarantine. *Held*, that the court having adjudged that the action of her grantee to recover dower was barred by limitations, and that judgment being affirmed on appeal, that holding put the plaintiff out of the case, and it likewise settled the entire controversy, for the only use she

DOWER—Continued.

could then make of a judgment annulling her deed would be to aid her in procuring an assignment of dower as against the children of her husband, and the pleadings make no such issue between her and them. *Smith Bros. Land Co. v. Phillips*, 595.

ELECTIONS.

1. **Ballots: Evidence in Criminal Prosecution: Constitutional Provision: Power of People.** The people have power, by a constitutional provision, to prohibit the use of ballots cast at an election as evidence in a criminal prosecution, and if they have so prohibited their use no argument to the effect that the Constitution should not be permitted to stand in the way of a prosecution for crime can be indulged by the courts. *In re Oppenstein*, 421.
2. ———: ———: ———: **Governmental Policy: Province of Courts.** The question whether election ballots can be used as evidence in a criminal prosecution was determined by the convention which framed the Constitution and by the people who adopted it, and with that policy the courts have nothing to do. The whole power of the courts in reference thereto is to decide what policy was adopted, and if the policy is written in the Constitution, whether good or bad, the courts will not displace it and substitute another. *Ib.*
3. ———: ———: **Secrecy.** The proposition that a simple provision in the Constitution that "elections shall be by ballot" introduces absolute secrecy, is established by the decision of the courts, the views of text-writers, and the history of the origin of voting by ballot and the nature of the evils it was intended to remedy. *Ib.*
4. ———: ———: ———: **One-Sided Policy.** At the time the Constitution of 1875 was adopted, it was settled beyond doubt that election by ballot meant an election by secret ballot; and the question of policy was not one-sided, but the convention made choice between policies, and the choice is expressed in Section 3 of Article VIII of the Constitution the people adopted. *Ib.*
5. ———: ———: **Constitutional Provision: Modification: By Ballot.** Words used in the Constitution cannot be modified or affected by anything outside of the Constitution; they cannot be changed by the Legislature or the courts or by any other than the people. The words of the first clause of Section 3 of Article VIII that "all elections by the people shall be by ballot" had a definite and settled meaning when they were written into the Constitution, and if they stood alone and unqualified by other words therein it would have to be ruled that ballots cast or counted at an election cannot be used in a criminal prosecution. *Ib.*
6. ———: ———: ———: **Secrecy: Removal by Numbering.** The provision in the Constitution requiring the ballots to be numbered removes the veil of secrecy to some extent, but does not destroy it entirely; it does not uncover the ballot of any voter, nor does the provision authorize any action by any one which would, of itself, disclose the character of the ballot. *Ib.*
7. ———: ———: ———: ———: **Comparing Ballots.** Except in cases of contested elections, no permission is given by the Constitution to compare the ballots with the list of voters; and the fact that such permission is expressly given in election con-

ELECTIONS—Continued.

tests is no reason for saying that such a comparison may be made in proceedings which are not election contests, such as a criminal prosecution growing out of alleged frauds at an election. *Ib.*

8. ———: ———: **Election Officers: Permission to Testify: Ballots as Evidence: Wisdom.** Section 3 of Article VIII of the Constitution permits election officers to testify in judicial proceedings concerning the way in which a voter voted, but that provision has nothing to do with the use of the ballots in evidence. And the use of the ballots cannot be authorized on the theory that it is absurd to permit such secondary evidence and exclude the primary evidence, for the question is not the wisdom or consistency of the provisions, but what they declare. *Ib.*
9. ———: ———: **Comparison in Contests: Inapplicable to Other Proceedings.** The proviso that "in all cases of contested elections, the ballots cast may be counted, compared with the list of voters, and examined under such safeguards and regulations as may be prescribed by law," does not authorize the use of ballots in proceedings other than cases of contested elections. It has no pertinence to any proceeding except cases of election contests, and cannot be extended to such other proceeding. The proviso does not of itself expressly prohibit the use of ballots in other proceedings, yet the very fact that special provision was deemed necessary in cases of election contests makes applicable the well known canon of construction that *expressio unius exclusio alterius est*. *Ib.*
10. ———: ———: ———: ———: **As Interpreted by the Constitutional Convention.** That the proviso to Section 3 of Article VIII of the Constitution does not apply to judicial proceedings is further made plain by a rejection by the Constitutional Convention, by a vote of 42 to 23, of a proposed substitute which declared that "all ballots shall be subject to inspection and examination in all cases of contested elections and judicial proceedings." *Ib.*
11. ———: ———: **Ballots as Evidence: Statutory Authority.** In so far as a statute (Sec. 5403, R. S. 1919) conflicts with the Constitution it is without force, for the Legislature has no authority to authorize what the Constitution prohibits. *Ib.*
12. ———: ———: ———: ———: **Primary Elections.** Section 3 of Article VIII of the Constitution does not apply to primary elections, and the Legislature is not restrained by said section from enacting a law pertaining to them. *Ib.*
13. ———: ———: ———: **Exposure by Contest: Vote for Other Officers.** Where other officers were voted for in the municipal election, and in a contest instituted for the office of mayor a comparison of the ballots with the lists of voters is being made, it is unlawful to make public how said voters voted for such other officers, and if their ballots have thereby been exposed and the veil of secrecy destroyed it would be still further unlawful to use them as evidence in a criminal prosecution. *Ib.*
14. ———: ———: ———: **Statutory Prohibition.** Section 5403, Revised Statutes 1919, declaring that ballots shall "in no way be used or any information disclosed that would tend toward showing who voted any ballot," while invalid in so far as it relates to cases of election contests, is not otherwise prohibited by the Constitution,

ELECTIONS—Continued.

and forbids the use of ballots as evidence in a criminal prosecution. *In re Oppenstein*, 421.

15. **Ballots: Constitutional Provision: Governmental Policy: Power of Courts.** If the State of Missouri has tied her hands by her Constitution, it is not within the power of the courts or of the Legislature to untie them. Furthermore, if one court can open ballot boxes in any proceeding other than an election contest, all courts can do likewise and the ballot would no longer be a secret ballot. *Ib.*
16. **Denial of Writ in Another Case.** The denial of a writ in another similar case by merely marking the word "denied" on the application cannot be considered as overruling previous decisions. Writs are frequently denied for reasons which do not arise out of substantive law. *Ib.*

EMINENT DOMAIN. See **Streets.**

EQUITY.

Action At Law: Equitable Defense: Subrogation: Destroying Action.

To convert an action at law into a suit in equity the matters set up in the answer as constituting the equitable defense must, taken as true, destroy plaintiff's right to recover, and must ask for affirmative relief on that ground. *State ex rel. Ins. Co. v. Reynolds*, 382.

ESTOPPEL.

1. **Homestead: Sale.** Where the children knew nothing of the administratrix's sale of the homestead, ordered by the probate court to pay decedent's debts, and received none of the proceeds, and the widow refused, as administratrix, to file a petition for its sale and it was filed by the creditors because of her refusal, the children are in no sense estopped to recover the homestead property, even though one of them was twenty-two years old at the time of her father's death, and the other twenty-two when the sale was made, and the widow used part of the proceeds in paying a balance due on the land. *Dennis v. Gorman*, 1.
2. **Tax Sale: Surplus Money Paid to Life Tenant: Order of Court.** Where the life tenant, occupying a fiduciary relation to the remaindermen and under obligation to protect their estate, caused or allowed a suit for taxes to be instituted for the purpose of covinously defeating their title, his motion, sustained by the court, directing the sheriff to pay over to him the surplus money in his hands arising from the tax sale, will not estop them from claiming title. Such payment bars a renewal of any claim to the surplus fund, but it was not *res adjudicata* as to the remaindermen's title. *Mathews v. O'Donnell*, 235.
3. **Divorce: Estoppel by Judgment in Alienation Suit.** A judgment for divorce, in an action brought by the wife against her husband, to which he made no defense, determines the status of the parties to it, but is not conclusive upon strangers as to the facts in said suit litigated, and does not operate as an estoppel in a suit by the husband against the seducer of the wife for criminal conversation and the alienation of her affections, even though her petition in the divorce suit alleged as one ground for divorce that her husband had charged her with adultery with the said seducer. The seducer not having been a party to the action for divorce, a

ESTOPPEL—Continued.

judgment for the wife therein was not such an adjudication that the seducer had not committed adultery with the wife as estops the husband from maintaining an action for damages against the seducer for alienation and criminal conversation with the wife prior to the time the divorce judgment was rendered. *Pollard v. Ward*, 275.

4. ———: ———: **Petition and Judgment as Evidence.** But the petition and judgment in the wife's suit for divorce brought against the husband, in which she alleged as a ground therefor that he had charged her with adultery with a certain man, are admissible in evidence in a subsequent action by the husband against such man for damages for alienating the affections of the wife, as admissions, even though the husband filed no answer in said suit, but they are admissible not as conclusive against him, but only as any other admissions which may go to the jury for what they are worth. *Ib.*
5. ———: **Estoppel by Conduct.** The husband is not estopped by his failure to file an answer in the divorce suit brought by his wife, in which she alleged as one ground for divorce that he had charged her with adultery with a certain man, from maintaining an action for damages against said man for alienation and criminal conversation committed prior to the time the suit for divorce was instituted; for, even though it be conceded that the husband's conduct in the divorce suit in defaulting and failing to meet the wife's charge is inconsistent with his claim for damages in the alienation suit, two necessary elements of estoppel *in pais* are lacking, namely, the defendant did not act upon the faith of the husband's conduct in the divorce suit, for his criminality with the wife occurred before that suit was brought, and, second, the defendant is not injured in any manner by the husband's failure to contradict or controvert the wife's charges in the divorce suit. *Ib.*
6. ———: **Estoppel by Property Settlement.** The fact that the husband in the divorce action brought by his wife paid his wife four thousand dollars as alimony and obtained from her a deed by which she conveyed to him her interest in property which he had acquired from her father, in no wise affects the defendant in the husband's suit for alienation and criminal conversation with the wife, and hence does not constitute estoppel. *Ib.*
7. **Dedication of Street: By Grantor's Deed: Call For Street: Available to Public.** While the rule is that an estoppel by deed, including an implied covenant, can operate only in favor of the grantee or his privies in estate, and estoppel *in pais* can operate only when representations have been made to a legal person, who has relied upon them to the extent that it would be inequitable to allow them to be withdrawn, a call for a street in a deed from one individual to another is more than a mere description, for it is an implied covenant that there is such a street, and where such individual has accepted the deed and acted on it in reliance upon such covenant the general public can avail itself of an estoppel in his favor. *St. Louis v. Clegg*, 321.
8. **Alienation: Alimony Paid: Mutuality.** The fact that plaintiff, after her husband's separation from her, brought an action of divorce against him, and in the settlement of her claim for alimony ob-

ESTOPPEL—Continued.

tained \$7,500 from him, in consideration for her deed releasing all claims to his estate, does not estop her from maintaining an action for damages against his sister for alienating his affections and causing him to separate from her. There was no mutuality between the plaintiff in the divorce case and defendant in the alienation suit, and without mutuality there can be no estoppel. *Hollinghausen v. Ade*, 362.

EVIDENCE.

1. **Life Insurance: Suicide: Burden of Proof.** Where an ordinary life insurance policy contains a valid provision that if the insured shall within one year commit suicide, sane or insane, then such policy shall be null and void, the burden of proof that the insured did commit suicide is upon the insurance company, for suicide is an affirmative defense that must be both pleaded and proved; and though the policy contains the provision that suicide, "sane or insane," shall avoid the policy, the burden still rests upon the company to show that the insured designedly, and not accidentally, killed himself, for suicide is the act of designedly destroying one's own life. *Parker v. Aetna Life Ins. Co.*, 42.
2. ———: ———: **Plaintiff's Admissions: Wholly Circumstantial.** The answer to the contention that the evidence of the manner in which the insured took his own life is not all circumstantial, because the plaintiff herself admitted that the insured committed suicide, is her denial that she ever made such admission. Besides, her admissions to that effect in the proof of death made to other companies, and in statements by her on other occasions, if made, are but conclusions drawn from the circumstances surrounding the insured's death, and are not absolutely binding upon the jury, but it is the duty of the jury to arrive at the ultimate fact as to whether or not the insured did commit suicide, from all the facts and circumstances, including the admissions, if any, made by her; and the weight to be attached to her admissions, in view of her hysterical condition, at the time she witnessed the tragedy and when she is said to have made such admissions, is likewise a question for the jury. *Ib.*
3. ———: ———: **Drunken Man.** Where the discharge of the automatic pistol may as well have happened from the careless conduct of a drunken man as from an intentional act, and a door shut off from view the exact manner in which the pistol was discharged and prevented definite knowledge, and everything in his business and conduct prior to the time he became intoxicated indicated a purpose to press forward with energy, it cannot be ruled that all reasonable men would agree that the undisputed facts and circumstances exclude every reasonable hypothesis except suicide. *Ib.*
4. ———: ———: **Presumption.** Where the facts and circumstances are made to appear in evidence, the presumption against suicide, as a presumption of law, disappears, but as a presumption of fact it is and must ever be present with all reasonable men whose duty it is to pass upon the ultimate fact of suicide or accident, where the evidence is all circumstantial. *Ib.*
5. **What Witness Thought: Corrected.** It is not improper to strike out the answers of a witness beginning with, "I understand," "I thought," "I think," etc.; but if there is any error in striking them out, appellant cannot complain when the same answers were brought

EVIDENCE—Continued.

before the jury, in their full comprehensiveness, by respondent's evidence on cross-examination. *Ib.*

6. **Powder Burn: Distance of Pistol from Wound: Non-Expert Matter.** The witness, after stating that the wound in the deceased's forehead was very dark and looked like a powder-burn, and that for five years he had investigated wounds caused by fire arms and had probably investigated more than a hundred murders and suicides, was asked to state whether he was able to state, from the condition of the wound and the discoloration, where the muzzle of the pistol was with reference to the head at the time it was discharged. He answered that he could not "tell absolutely; I cannot tell in inches where the gun was." Asked for his best judgment, he replied that his judgment from the condition of the wound, was that "the distance was very close to the head, within a foot—twelve inches," and this last answer, over appellant's exception, was stricken out. *Held*, that the witness had stated all the facts on which his conclusion was based, the distance from the wound when the pistol was fired was not a matter of expert knowledge, the jury could determine the distance as well as could the witness, and no error, certainly no reversible error, was committed in excluding that part of the answer stricken out. *Ib.*
7. **Inference: Happy Life: Conclusions: Waiver.** In a suit on a life insurance policy, where the defense is suicide, testimony that the home of the insured was a very happy one, that he and his wife and children were very devoted to each other, that he was very cheerful and optimistic, and that from observation and experience in seeing him he had a very happy outlook on life, is not to be considered as mere conclusions of the witnesses, but an inference necessarily involving certain facts which may be stated without the facts, the inference being equivalent to a specification of the facts. And where appellant's counsel, on cross-examination of the witnesses, and of plaintiff and other witnesses, proved the same inferences, the testimony in no way injured appellant's cause, and no reversible error could in any event be predicated upon its admission. *Ib.*
8. **Conveyance: Testamentary Deed: Retaining Possession.** Retention of the management and control of property after a deed of gift conveying it to nieces is signed, acknowledged and handed to one of them, paying taxes and making improvements upon it, receiving the rents and placing it in the hands of an agent to be sold, by the grantor, are evidence that it was not her intention that the deed should take effect and pass title as a present transfer. *Coles v. Belford*, 97.
9. ———: ———: ———: **Self-Serving Evidence.** In a suit by heirs of the maker against the grantees to set aside a deed of gift, letters written by the grantor, after she had signed and acknowledged it, to a real estate agent, her banker and attorney, relating to the payment of taxes upon the property, the making of repairs and the sale thereof, are not merely self-serving statements, but competent cumulative evidence consistent with the oral testimony of the addressees who detail facts showing her continued exercise of control over the property and her intention that the deed was not to become effective until her death. Besides, the grantees, having admitted in their answer that the grantor continued to control the property after the execution of the deed, cannot be heard to complain of such letters. *Ib.*

EVIDENCE—Continued.

10. **Witness: Expert: Qualification: Waiver.** Where an objection that a witness had not shown himself qualified to testify as to the speed of a car was sustained, and thereupon the witness was further qualified and then proceeded without further objection to give his judgment of the speed, opposite counsel are in no position to insist he was improperly permitted to testify. *Hill v. K. C. Rys. Co.*, 193.
11. ———: **Written Statement: Denial.** A witness for defendant, who at a former trial was a witness for plaintiff, in a way denied a written statement and his signature thereto. Without objection he signed his name upon a separate piece of paper, and it was admitted for comparison with his purported signature on the statement. Another witness testified that prior to the former trial the witness had admitted that the written statement and signature were his. *Held*, there was no error in the admission in evidence of the written statement. *Ib.*
12. **No Objection.** Unless objection is raised to testimony at the time the witness states it, its competency will not be ruled on appeal. *Pollard v. Ward*, 275.
13. **Note: Implication of Payment.** It would be singular that a physician, actively engaged in the practice of medicine, making money in dealing in real estate, in which transactions he had continuous dealings with local banks, should not only borrow, but retain without any payments for almost ten years, considerable amounts of money from a brother, who, not shown to possess any unusual amount of property, combined the vocation of a barber with that of a druggist in a small town in another state; but these facts, though undisputed, are not substantial proof that the notes, if made, have been paid. *Lawson v. Meffert*, 337.
14. **Admission Made in Extremis.** Admission of a statement made by the purported maker of the notes sued on at a time when he was *in extremis* is error. And a statement that "I have fixed his notes, and he will get his money," with no evidence connecting it with the notes sued on and none identifying the person referred to, even if made in a lucid interval, is inadmissible and prejudicial. *Ib.*
15. **Conveyance: Incapacity of Grantor: Expert Testimony: Exploded by Her Own.** In a suit to cancel a deed and lease made by a mother to her son, testimony of the mother at the trial, eight months after the instruments were executed, in which she clearly relates the conversations and agreement between herself and the son at and prior to their execution, is of itself sufficient to explode the testimony of medical experts to the effect that at the time the instruments were executed she was of unsound mind and incapable of entering into such contractual relations. *Smith v. Smith*, 405.
16. **Election Ballots: Evidence in Criminal Prosecution: Secrecy: Removal by Numbering.** The provision in the Constitution requiring the ballots to be numbered removes the veil of secrecy to some extent, but does not destroy it entirely; it does not uncover the ballot of any voter, nor does the provision authorize any action by any one which would, of itself, disclose the character of the ballot. *In re Oppenstein*, 421.
17. ———: ———: ———: ———: ———: **Comparing Ballots.** Except in cases of contested elections, no permission is given by the Constitution to compare the ballots with the list of voters; and the

EVIDENCE—Continued.

fact that such permission is expressly given in election contests is no reason for saying that such a comparison may be made in proceedings which are not election contests, such as a criminal prosecution growing out of alleged frauds at an election. *Ib.*

18. ———: **Election Officers: Permission to Testify: Ballots as Evidence: Wisdom.** Section 3 of Article VIII of the Constitution permits election officers to testify in judicial proceedings concerning the way in which a voter voted, but that provision has nothing to do with the use of the ballots in evidence. And the use of the ballots cannot be authorized on the theory that it is absurd to permit such secondary evidence and exclude the primary evidence, for the question is not the wisdom or consistency of the provisions, but what they declare. *Ib.*
19. ———: **Comparison in Contests: Inapplicable to Other Proceedings.** The proviso that "in all cases of contested elections, the ballots cast may be counted, compared with the list of voters, and examined under such safeguards and regulations as may be prescribed by law," does not authorize the use of ballots in proceedings other than cases of contested elections. It has no pertinence to any proceeding except cases of election contests, and cannot be extended to such other proceeding. The proviso does not of itself expressly prohibit the use of ballots in other proceedings, yet the very fact that special provision was deemed necessary in cases of election contests makes applicable the well known canon of construction that *expressio unius exclusio alterius est*. *Ib.*
20. **Fraud and Deceit: Several False Representations: Proof of One.** Where several false representations are charged to the defendant, any one of which is sufficient to constitute an action for fraud and deceit, substantial proof of any one of them is sufficient to carry the case to the jury. *Morrow v. Franklin*, 549.
21. ———: **Sale of Stock: Fictitious Sale of Railroad.** Evidence that the president of a trust company sold its stock to plaintiff at \$190 per share with the assurance that its book value was \$200, at a time when the company was insolvent, the result of happenings through years, carefully concealed by fictitious and imaginary profits and the payment of dividends never earned; that the said president told plaintiff, prior to purchase of the stock, that the company had sold for subsequent delivery a railroad, financed and built by it, at a profit of one million dollars, whereas in fact he had only given an eighteen months' option on the road; and that this railroad was one of the chief factors in the ultimate wreck of the trust company, is sufficient, in an action of fraud and deceit, to submit to the jury the issue whether the sale of the stock to plaintiff was induced by the false representations of its president that the company was in a solvent and prosperous condition and the book value of its stock was worth what he said it was, these facts being sufficiently pleaded. *Ib.*
22. ———: **Value at Time: Subsequent History of Corporation.** In an action of fraud and deceit based on the fraudulent sale of the stock of a corporation at a false and fictitious value, the value of the stock at the date of the purchase is the value to be considered in determining the damages, but the subsequent history of the corporation and the conditions and rapid fall in the price of its stock thereafter may be shown as throwing light upon the

EVIDENCE—Continued.

value at the time of the purchase, especially where there was no radical change in the real assets and liabilities of the company during the subsequent months up to the time of its failure, and the defendant had in writing represented to plaintiff that he had "inside knowledge of the company's affairs." And such evidence being proper, it is not error to instruct the jury that the real value at the time of the purchase may be ascertained "in the light of the subsequent events in the history of the company." *Morrow v. Franklin*, 549.

23. **Fraud and Deceit: Several False Representations: Printed Circulars.** Directors of a trust company are liable to a purchaser of its stock for false representations of its financial condition contained in printed pamphlets and circulated with their knowledge for the purpose of inducing people to purchase. *Ib.*
24. ———: ———: **Representations of Fact.** Positive statements concerning the present or past earnings of a corporation, or the value of its stock, or the value and soundness of its assets, or the amount of its liabilities, made by its officers and directors, are not mere expressions of opinion, but representations of fact upon which a prospective purchaser of its stock has a right to rely. *Ib.*
25. ———: ———: **Expressions of Opinion: Refusal to Withdraw From Jury.** Statements made by defendant, the president and director of a trust company, sued for fraud and deceit based on false statements as to the value of stock sold to plaintiff, that the company could continue indefinitely to pay a four per cent quarterly dividend, that if plaintiff bought its stock at \$190 per share he could sell it in six months at a profit or advanced price, that the stock would by the next January be worth \$300 per share, and that the company could be liquidated in twelve months and the sum of \$200 per share paid to the stockholders, if they stood alone, would be mere expressions of opinion, but made in connection with representations as to the value of the stock and the condition of the company and its assets and made for the purpose of strengthening those representations and as a part and parcel of them, it was not error for the court to refuse to give instructions withdrawing them from the jury's consideration; and in view of the fact that the court in other instructions told the jury what statements were statements of fact and not mere opinions, and further told them explicitly what representations would authorize a verdict for plaintiff, in which no mention was made of these statements, the refusal to withdraw them even if considered mere expressions of opinion, was at most harmless error. *Ib.*
26. **Negligence: Railroad Crossing: Obstruction by Telegraph Poles.** Testimony that a driver of an automobile cannot see a train of six coaches a half mile distant at any point within eighty feet of the track on account of telegraph poles located one hundred and seventy-five feet apart along the edge of the right of way is so unreasonable and against all common observation and experience as to be devoid of probative force. *Alexander v. Frisco Ry. Co.*, 599.
27. **Landlord and Tenant: Repair of Other Steps.** Plaintiff sued her landlord for personal injuries due to the unsafe and rotten condition to the front entrance steps to a flat, one story of which she had leased. Some time previously the defendant had employed a carpenter to repair the back steps, and this carpenter took to de-

EVIDENCE—Continued.

defendant a note on which plaintiff had written: "All work is done right." There was no evidence connecting the paper with the subject of the suit, while the testimony of defendant shows affirmatively that there was no such connection. *Held*, that the admission of the paper in evidence was prejudicial error against plaintiff. *Roman v. King*, 641.

28. —: **Meddling With Loose Step: Contributory Negligence.** For the tenant to move the loose end of a wooden step—loose because the wooden carrier is rotten—six or seven inches, and then to put it back in the position it had occupied before, or to pick it up and show it to her neighbors and then to put it back where it was before, does not constitute an act of negligence, and does not fix upon such tenant responsibility for her injury when, subsequently, in descending the steps, said step slipped from under her foot and thereby she was thrown to the ground; and an instruction which tells the jury that such acts constitute contributory negligence which bars her recovery of damages from her landlord for such injuries is in effect a peremptory instruction to find for defendant, and is highly prejudicial to her. It is not the law that if the tenant meddles with a step leading to her leased premises in the interest of her own safety, the owner is released from all liability for negligence in creating a situation so dangerous that safety required its correction. *Ib.*

EXECUTION.

Erroneous Judgment: No Supersedeas: Title of Purchaser. Where the judgment of the circuit court in an action for debt was for plaintiff and was not void, but only erroneous, and on writ of error without a *supersedeas* staying execution was reversed, but before said writ issued execution was issued and levied on defendant's land, the purchaser at such sale, if a stranger to the proceeding, takes the title, which is in no way impaired by such reversal. *Sidwell v. Kaster*, 174.

FALSE REPRESENTATIONS. See **Fraud and Deceit.**

FIDUCIARY RELATION. See **Parent and Child.**

FRAUD AND DECEIT.

1. **Scienter: Allegation Tantamount to Knowledge.** *Scienter* means knowledge on the part of the person making representations, at the time they are made, that they are false, and in actions of fraud and deceit it is necessary to allege and prove the *scienter*; but it is not necessary to expressly allege that the defendant knew his representations upon which the action is based were false; it is sufficient if the language used is tantamount to an allegation of knowledge that they were false; it is sufficient if the petition charges that the representations were false, were made by defendant himself, and therefore necessarily known to him, that they were "knowingly" made and done for "the fraudulent purpose of deceiving the public," and especially should such allegations be held to be a sufficient plea of the *scienter* after verdict, where no demurrer to the petition was filed and its insufficiency was first raised by an objection to the introduction of testimony. *Morrow v. Franklin*, 549.
2. **Several False Representations: Proof of One.** Where several false representations are charged to the defendant, any one of which

FRAUD AND DECEIT—Continued.

is sufficient to constitute an action for fraud and deceit, substantial proof of any one of them is sufficient to carry the case to the jury. *Morrow v. Franklin*, 549.

3. **Sale of Stock: Fictitious Sale of Railroad.** Evidence that the president of a trust company sold its stock to plaintiff at \$190 per share with the assurance that its book value was \$200, at a time when the company was insolvent, the result of happenings through years, carefully concealed by fictitious and imaginary profits and the payment of dividends never earned; that the said president told plaintiff, prior to purchase of the stock, that the company had sold for subsequent delivery a railroad, financed and built by it, at a profit of one million dollars, whereas in fact he had only given an eighteen months' option on the road; and that this railroad was one of the chief factors in the ultimate wreck of the trust company, is sufficient, in an action of fraud and deceit, to submit to the jury the issue of whether the sale of the stock to plaintiff was induced by the false representations of its president that the company was in a solvent and prosperous condition and the book value of its stock was worth what he said it was, these facts being sufficiently pleaded. *Ib.*
4. —: **Evidence: Value at Time of Sale: Subsequent History of Corporation.** In an action of fraud and deceit based on the fraudulent sale of the stock of a corporation at a false and fictitious value, the value of the stock at the date of the purchase is the value to be considered in determining the damages, but the subsequent history of the corporation and the conditions and rapid fall in the price of its stock thereafter may be shown as throwing light upon the value at the time of the purchase, especially where there was no radical change in the real assets and liabilities of the company during the subsequent months up to the time of its failure, and the defendant had in writing represented to plaintiff that he had "inside knowledge of the company's affairs." And such evidence being proper, it is not error to instruct the jury that the real value at the time of the purchase may be ascertained "in the light of the subsequent events in the history of the company."
5. —: **Presumptive Knowledge of Directors.** In an action for fraud and deceit brought against the president of a trust company for fraudulent representations in the sale of its stock, at a price far above par, at a time when it was in fact insolvent and its stock had been given a fictitious book value, it is not erroneous to instruct the jury that "it is the duty of a director of a trust company to ascertain the value of its assets and the amount and extent of its liabilities, and the law presumes that a director is familiar with the surplus and profits and the intrinsic value of its assets and the amount of its liabilities." The statute (Secs. 1131, 1133, R. S. 1909) imposes upon directors of trust companies the duty of knowing their exact status, and the law presumes that they perform that duty. Besides, in this case, such instruction, if technically erroneous, was harmless, because defendant in a letter to plaintiff, prior to the sale of the stock, said he had "inside knowledge of the affairs of the company." *Ib.*
6. —: **Trust Company.** It is the duty of directors of a trust company, made so by statute, to know its financial condition, the value of its assets and the extent of its liabilities at the time they

FRAUD AND DECEIT—Continued.

offer its stock for sale, or induce others to buy it from other stockholders. *Ib.*

7. ———: **Reliance Upon Statement of Directors: Access to Books.** A stockholder of a trust company, employed in its place of business, with a legal right to examine its books, has a right to rely upon the statements and representations of its officers and directors, and is not bound to examine the books for himself before purchasing its stock. *Ib.*
8. ———: **Printed Circulars.** Directors of a trust company are liable to a purchaser of its stock for false representations of its financial condition contained in printed pamphlets and circulated with their knowledge for the purpose of inducing people to purchase. *Ib.*
9. ———: **Representations of Fact.** Positive statements concerning the present or past earnings of a corporation, or the value of its stock, or the value and soundness of its assets, or the amount of its liabilities, made by its officers and directors, are not mere expressions of opinion, but representations of fact upon which a prospective purchaser of its stock has a right to rely. *Ib.*
10. ———: **Measure of Damage.** The measure of damages, in an action of fraud and deceit, based on a sale of the stock of a corporation, induced by the false representation of its president as to its value, is the difference between the value it would have had if such representations had been true, and the real value at the time of the purchase. Nor is it error to instruct the jury that such real value may be ascertained "in view of the subsequent events in the history of the company" where the subsequent history of the company is properly admitted in evidence. *Ib.*
11. ———: **Expressions of Opinion: Refusal to Withdraw From Jury.** Statements made by defendant, the president and director of a trust company, sued for fraud and deceit based on false statements as to the value of stock sold to plaintiff, that the company could continue indefinitely to pay a four per cent quarterly dividend, that if plaintiff bought its stock at \$190 per share he could sell it in six months at a profit or advanced price, that the stock would by the next January be worth \$300 per share, and that the company could be liquidated in twelve months and the sum of \$200 per share paid to the stockholders, if they stood alone, would be mere expressions of opinion, but made in connection with representations as to the value of the stock and the condition of the company and its assets and made for the purpose of strengthening those representations and as a part and parcel of them, it was not error for the court to refuse to give instructions withdrawing them from the jury's consideration; and in view of the fact that the court in other instructions told the jury what statements were statements of fact and not mere opinions, and further told them explicitly what representations would authorize a verdict for plaintiff, in which no mention was made of these statements, the refusal to withdraw them even if considered mere expressions of opinion, was at most harmless error. *Ib.*
12. **Action at Law: Weighing Evidence on Appeal.** An action of fraud and deceit, brought by the purchaser of stock of a corporation for damages, based upon the false representations of the defendant as to its value, is an action at law, and if there is substantial evidence

FRAUD AND DECEIT—Continued.

to support the verdict of the jury, its weight is not for the consideration of the appellate court, however sharp are the issues of facts presented; but, the case being without error committed in the trial, the judgment approved by the trial court will be affirmed. *Morrow v. Franklin*, 549.

FRAUDS.

Foreclosure Sale: Conspiracy Not to Bid: Inadequacy of Price. In a suit to quiet title, brought by the purchaser at a sheriff's sale of land worth \$100 to \$125 per acre, and another who had purchased after the sale and paid a part of the purchase price, against the mortgagor who claims the foreclosure proceeding was void, it will not be held that there was a conspiracy between the purchaser at the sheriff's sale and the person to whom he subsequently sold that the buyer would not bid at said sale, there being no evidence that he would have bid or intended to bid had there been no agreement to buy, and there being evidence that he could not get a clear title because of the outstanding dower of the judgment debtor's wife, who by his fault had not been impleaded with him in the foreclosure proceedings. Nor under such circumstances will it be held that the price of \$68.75 per acre paid at the sheriff's sale was inadequate, the wife's dower not being included. *Sidwell v. Kaster*, 174.

FRAUDULENT CONVEYANCE.

Conveyance: Purchase from Fraudulent Grantor: Notice: Failure to Testify. The burden of proving a bona-fide purchase from a fraudulent grantor is on the party pleading it, and to support the plea he must prove that he bought without notice, and paid the purchase money without notice. And failure of such purchaser to testify creates an inference that he refrained because the truth would not aid his contention, and of itself affords strong evidence of the fraud. *Mathews v. O'Donnell*, 235.

FREE PASS. See **Railroads.**

GENERAL ASSEMBLY. See **Legislature.**

HOMESTEAD.

1. **Homestead Act: Liberally Construed.** The homestead laws create a special statutory estate not governed by the general laws of descent and distribution. Their purpose was to afford a safe anchorage for a man and his wife and children against financial stress and storm, and accordingly are to be liberally construed in their favor and against creditors. But they cannot be construed beyond their evident intent. *Dennis v. Gorman*, 1.
2. **By What Law Fixed.** The rights of the widow and children and of the creditors in the householder's homestead are fixed and determined by the law in force at the time of his death. Where he died October 15, 1907, the rights of his widow, children, grandchildren and creditors were fixed by the Act of 1907, which is the same as Section 6708, Revised Statutes 1909. *Ib.*
3. **Sale by Probate Court: Collateral Attack.** Under the Homestead Act of 1895 (Sec. 3620, R. S. 1899) and the Homestead Act of 1907 (Sec. 6708, R. S. 1909), the probate court had no jurisdiction to

HOMESTEAD—Continued.

order the homestead of a deceased householder to be sold to pay his debts not legally charged thereon in his lifetime, where he left a wife and surviving children; but such a sale was an absolute nullity and void, and being such it can be nullified in a collateral proceeding. *Ib.*

4. ———: **Act of 1907.** The Homestead Act of 1907 (Sec. 6708, R. S. 1909) gave to the probate court no more jurisdiction to order the sale of the homestead of a deceased householder who left children him surviving than did the Act of 1895 (Sec. 3620, R. S. 1899). By the said Act of 1907, it is only in case the heirs of the husband "be persons other than his children" that the probate court has power or jurisdiction to order the sale of his homestead to pay debts not legally charged thereon in his lifetime. Not even when one of his heirs is a grandchild, there being children, can the homestead be sold; for the Act of 1907 means that it is only in case all the husband's heirs are "persons other than his children" that his homestead can be sold to pay his debts not expressly charged thereon in his lifetime. *Ib.*
5. **Abandonment by Wife and Children: Sale to Pay Debts.** The fact that the widow and children left the homestead and moved to another county after the homesteader's death did not increase the jurisdiction of the probate court to order it sold to pay his debts not expressly charged thereon in his lifetime. The rights of his children become vested in them as remaindermen in fee upon his death, and there is nothing in the statute requiring them to continue to reside on the property or forfeit their title. *Ib.*
6. **Grandchild: Right to Fee.** The householder having died leaving two children, one of them a minor, and a grandchild, and the statute saying that the homestead can only be sold to pay debts if the heirs of the husband were "persons other than his children," the attempted sale of the homestead under orders of the probate court was void, not only as to the two children, but as to the grandchild as well. *Ib.*
7. **Sale: Estoppel.** Where the children knew nothing of the administratrix's sale of the homestead, ordered by the probate court to pay decedent's debts, and received none of the proceeds, and the widow refused, as administratrix, to file a petition for its sale and it was filed by the creditors because of her refusal, the children are in no sense estopped to recover the homestead property, even though one of them was twenty-two years old at the time of her father's death, and the other twenty-two when the sale was made, and the widow used part of the proceeds in paying a balance due on the land. *Ib.*
8. **Conveyance by Widow: Quarantine.** A quit-claim deed by the widow of a deceased homesteader conveyed all her rights therein, whether of homestead, dower or quarantine, and his children who had reached their majority continued to own the fee subject to the rights conveyed to her grantee. And if her homestead right has been extinguished by remarriage, the right to possession by the children, the youngest having become of legal age, is subject to the former widow's unassigned dower. *Ib.*
9. **Grandchild: Right to Occupancy.** The minor grandchild of the deceased householder does not have the right of occupancy of his

HOMESTEAD—Continued.

homestead jointly with his widow and children, even though she had been residing with him as a member of his family, her parents being dead. The right of occupancy is given by statute only to minor children of the householder, and that right ceases when the youngest reaches twenty-one years of age. But such grandchild has a remainder in fee in the homestead property as an heir of the homesteader. *Dennis v. Gorman*, 1.

10. **Conveyance by Widow: Occupancy by Children; Unassigned Dower.** The right of the deceased householder's children to occupy his homestead, under the Act of 1907, ceased when the youngest of them reached twenty-one years of age, and where the youngest had reached that age at the time the widow conveyed her right and interests in the homestead, and she has since married, she no longer has a homestead right; but her grantee acquired her right of dower and quarantine until dower is assigned, and although the children are owners in fee their right to possession, the younger having reached legal age, is subject to the dower and quarantine of the former widow until dower is assigned. *Ib.*
11. ———: **Waste.** In the equitable partition no allowance should be made against a cotenant who cut and sold cedar timber from the homestead, in which the widow had quarantine and no assignment of dower had been made therein, the evidence showing that she received the money for which the timber was sold and that the cotenant simply acted as her agent in cutting and selling it. *Byrne v. Byrne*, 109.
12. **Greater Than Dower: Conveyance: Re-Marriage: Assignment.** Where the homestead was worth less than the statutory value and was all the land in which the widow was entitled to dower and she conveyed her "life interest" therein, her grantee became clothed with all her interest in the homestead, and of her alternate right to dower when she re-married, and of her right to quarantine until dower is assigned; and upon her re-marriage and the consequent extinguishment of her homestead, her rights of dower and quarantine remained unaffected, and her grantee may have dower assigned to him; but her homestead became extinguished upon her re-marriage, and the special statute of limitations began to run from that date, and her grantee must bring suit for the recovery of her dower within ten years or be barred. *Smith Bros. Land Co. v. Phillips*, 579.
13. **Duration as to Minors: Re-marriage of Widow.** Under the Homestead Act of 1895 the homestead estate of minor children is limited to the joint right of occupancy with the widow, and at her death or re-marriage it passes to them by descent as if no homestead law existed. *Ib.*
14. ———: ———: **Limitations.** The right of the widow to dower being assignable, and her homestead right being extinguished by her re-marriage, and the right to have dower assigned reviving upon the extinguishment of her homestead right, and the homestead estate of the minor children being limited to the joint right of occupancy with the widow, they are in possession after her re-marriage by right of inheritance from their father and not under the Homestead Act, and it is upon the date of her re-marriage that the right accrues to her or her assignee to have her dower admeasured and assigned, and the grantee in her deed, made after

HOMESTEAD—Continued.

- her husband's death and before her re-marriage, must bring his suit to have assigned and to recover her dower within ten years after her re-marriage, under the statute (Sec. 391, R. S. 1909) which declares that "all actions for the recovery of dower in real estate, which shall not be commenced within ten years after the death of the husband, through or under whom such dower is claimed or demanded, shall be forever barred." *Ib.*
15. **Assignment of Dower: Limitations.** Where the homestead is all the real estate of which the husband died seized and does not exceed the statutory value or quantity, it is unnecessary to appoint commissioners to assign dower to his widow; but her deed conveys her dower and her re-marriage extinguishes her homestead right, and the right of her grantee to have her dower admeasured to him accrues on the date of her re-marriage, and becomes extinct in ten years thereafter. *Ib.*
 16. ———: ———: **Quarantine: Limitations.** The widow's quarantine, which is her right to remain in and enjoy the mansion house and the messuages and plantation thereto belonging, is an incident to the right to have dower assigned, and when that right ceases quarantine also ceases, and where her grantee is barred by limitations to recover her dower he is also barred to recover any supposed quarantine right. *Ib.*
 17. **Dower: Re-marriage: Limitations.** Where the widow conveyed her interest in the homestead property and then married again, her right to dower accrued on her re-marriage, and the right of her grantee to maintain suit to have assigned and to recover dower is barred in ten years after her re-marriage, and said grantee being barred her right to have her deed cancelled as fraudulent and to have dower assigned to her is likewise barred in ten years. *Smith Bros. Land Co. v. Phillips, 595.*
 18. ———: ———: **Ejectment: Equitable Defense.** The widow conveyed her "life interest" in the homestead property, and then re-married, and more than ten years thereafter her grantee brought ejectment to have dower assigned and admeasured and to recover the same. To this action she, being in possession and all the householder's children having reached their majority, filed a cross-bill, alleging that her deed, made nineteen years prior thereto, was void for fraud perpetrated upon her by the grantee, and asking that said deed be cancelled, and claiming that she was entitled to exclusive possession by virtue of her statutory quarantine. *Held*, that the court having adjudged that the action of her grantee to recover dower was barred by limitations, and that judgment being affirmed on appeal, that holding put the plaintiff out of the case, and it likewise settled the entire controversy, for the only use she could then make of a judgment annulling her deed would be to aid her in procuring an assignment of dower as against the children of her husband, and the pleadings make no such issue between her and them. *Ib.*

IMPROVEMENTS ON REAL ESTATE. See **Partition.**

INSANE PERSONS. See **Jurisdiction.**

INSPECTION.

1. **Constitutional Law: Deceptive Words.** A legislative act is not made an inspection law by the frequent use of the word inspection; mere words do not determine its character, but that is to be ascertained from the language employed, the legislative intention indicated by such language, and the object and purpose of the act considered as a whole. *Coca Cola Co. v. Mosby*, 462.
2. ———: **Carbonated Waters: Grounds for Inspection.** The extensive manufacture and general use of carbonated waters, commonly known as "soft drinks," and other like preparations having no merit other than the creation of a pleasant but fleeting gustatory sensation, are the moving cause of legislation providing for their inspection. *Ib.*
3. ———: **Police Regulation: An Inherent Legislative Power.** The police power is inherent in the State as a sovereignty, and needs no organic grant for its exercise by appropriate legislation. It can always be used in the interest of the general welfare to restrain one man from so using his property as to injure another. *Ib.*
4. ———: ———: **Police Regulation.** Laws providing for the inspection of foods and drinks, if they relate to the purity of the article inspected and are designed to promote the public health by prohibiting the use of deleterious substances in their preparation, are the exercise of the police power. A prohibition may be placed by law upon the making and sale of any article deleterious to the user, and that may be accomplished by a reasonable inspection law. *Ib.*
5. ———: ———: **Inspection or Revenue Act: Provisions.** An act providing for the inspection of carbonated waters which defines the duties of an official who is charged with its execution, provides specifically for the products to be inspected, prohibits the manufacture and sale of such products as are not pure and wholesome, requires samples of such products to be submitted for inspection, requires labels showing the nature of the beverage and that it has been inspected as to character and purity to be placed upon all packages, prescribes a penalty for the misuse of the labels and for the failure of the inspector to perform his duties, prescribes the fees for inspection and directs that records of the inspection work shall be kept, is an inspection measure, whose purpose is to promote the public health, and, unless it can be shown that its operation is onerous and the result of its enforcement alien to the purpose of its enactment, will not be held to be a mere revenue measure, but a reasonable exercise of the police power. *Ib.*
6. ———: **Title.** The title to an inspection law need not expressly show that it is not a revenue measure. Section 28 of Article 4 of the Constitution does not require that the title of an act shall particularize the items it contains or does not contain. It simply means that the title shall unmistakably indicate the contents of the act. *Ib.*
7. ———: **By Sample.** Inspection of carbonated waters by sample, instead of the entire product, does not render the law invalid as a police regulation. *Ib.*
8. ———: **No Penalty for Manufacture.** An inspection law which affixes a penalty to the sale of an article unless it has been inspected and labeled is not invalid because it prescribes no penalty

INSPECTION—Continued.

for the manufacture of impure products. It is the sale of impure products that the law strikes at, for it is by their sale that injury to the public is made effective. *Ib.*

9. ———: **Excessive Fees: Revenue Measure.** Inspection fees are not restricted to the mere expense of the inspection. It is impossible for the Legislature, in enacting an inspection law, to determine the exact expense of its execution or to nicely gauge the charged that should be required. What is a reasonable fee depends largely upon the sound discretion of the Legislature. An inspection law will not be held to be a revenue measure merely because in the first years of its operation the fees collected amount to more than three times the expenses; especially should this be the ruling where the Legislature, after discovering such excess, made very substantial reductions in the fees to be thereafter charged. *Ib.*
10. ———: ———: **Presumption of Legislative Reduction.** An inspection law being otherwise valid and the amount of the fees to be charged being largely within the sound discretion of the Legislature, the presumption is that the Legislature, upon discovering that the fees authorized to be charged and collected largely exceed the probable costs of inspection, will reduce the fees, and the courts do not interfere, immediately upon application, upon a showing that the fees collected for the first two years after the enactment of the law largely exceeded the expense. *Ib.*

INSTRUCTIONS.

1. **Presumption of Fact: Contributory Negligence.** It is improper, ordinarily, to instruct a jury with reference to presumptions of fact as they relate to questions submitted for their determination after hearing the evidence. In a suit for damages for the negligent killing of a pedestrian by an automobile in the night time, an instruction telling the jury that "you are further instructed that the burden of proving contributory negligence on the part of the deceased is upon defendant; the presumption is that the defendant was in the exercise of ordinary care for his own safety at the time of his death, and this presumption continues until overturned by a preponderance or greater weight of the evidence," is erroneous, if there was any substantial evidence whatever of contributory negligence on the part of deceased, sufficient to take the question of the jury. *McKenna v. Lynch*, 16.
2. **Contributory Negligence: None as Matter of Law.** It cannot be said as a matter of law that at the time deceased was struck by an automobile on a traveled portion of a street not customarily used by pedestrians he was in the exercise of ordinary care for his own safety, where the time was a dark night, and there was evidence that he walked straight ahead without turning his face to the right or left, and that the advancing rays of the headlight shot past him while it was a hundred yards away. *Ib.*
3. **Will: Undue Influence: Peremptory Instruction.** Where there is no evidence of coercion having been exercised at or prior to the time the will was executed, and the only approach to proof of undue influence is the testimony of parties in interest that the testator subsequently to the execution of the will cried and said they made him change his will, it is the duty of the court to direct a verdict for the proponents. *Nook v. Zuck*, 24.

INSTRUCTIONS—Continued.

4. **Will: Testamentary Incapacity: Old Age: Paralysis.** Where the only evidence of testator's testamentary incapacity is that he was between eighty-five and eighty-six years of age, and had for sometime been paralyzed and unable to walk or use his hands, but his digestion and assimilation were good, and the paralysis had no tendency to affect his mind, there is no evidence of mental incapacity, and a peremptory instruction directing a verdict for proponents on that issue is proper. *Nook v. Zuck*, 24.
5. **Life Insurance: Suicide: Peremptory Instruction: Circumstantial Evidence.** Where the evidence as to the manner of the insured's death is wholly circumstantial, suicide cannot be declared by the court, as a matter of law, unless the circumstances exclude every reasonable hypothesis except suicide. *Parker v. Aetna Life Ins. Co.*, 42.
6. ———: ———: **Obscured by Matters Unnecessary to Prove.** An instruction for plaintiff telling the jury that plaintiff is entitled to recover unless they further find that the insured committed suicide, and others for defendant requiring a verdict for defendant if they find he did commit suicide, are not contradictory, should be read together, and clearly present the issue of suicide; and that issue, being the only contested one throughout a long trial, is not submerged or in any wise obscured by the fact that plaintiff's instruction includes matters which plaintiff was not absolutely required to prove, such as whether all premiums required to keep the policy in force had been paid, and that defendant failed to furnish blanks for proof of death and denied liability. *Ib.*
7. **Negligence: Federal Employers' Liability Act: Invoking Safety Appliance Act: Contributory Negligence.** A plaintiff who, by her petition, plants her action, for the recovery of damages for the killing of her husband while engaged in interstate commerce, upon the Federal Employers' Liability Act, is not precluded from the benefit of the several safety statutes, if they are called into play by the facts. Said act by express reference makes the safety statutes applicable under stated circumstances by providing that "no employee who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee;" and the Boiler Inspection Act is especially applicable where plaintiff's husband was a fireman and was injured by steam which escaped from the defective engine and enveloped the cab in which he was at work, for Section 2 thereof is made to "apply to and include the entire locomotive and tender and all parts and appurtenances thereof," and under such circumstances contributory negligence is not even a partial defense. *Kilburn v. Ry. Co.*, 75.
8. ———: ———: ———: **Assumption of Risks: Contributory Negligence: Instructions.** Section 2 of the Boiler Inspection Act made it "unlawful for any common carrier, its officers or agents," to use a locomotive in interstate commerce, unless such engine and all parts thereof were in proper condition and safe to operate in the service to which put, without unnecessary peril to life or limb, and this section is by express reference made applicable to an action based on the Federal Employers' Liability Act; and where the facts show that the piston rod on the left low-pressure

INSTRUCTIONS—Continued.

cylinder of the locomotive engine was broken off and the front end of the left cylinder had burst, and from said opening steam escaped when the train was running fast, and enveloped the cab in which plaintiff's husband as fireman was at work, and that the use of said engine was negligently continued in the operation of the train after its defective condition became known to the engineer, who was the fireman's superior, and such defective condition and negligent act were the proximate cause of the fireman's death, the instructions to the jury, in an action by the fireman's widow planted on the Federal Employer's Liability Act, should eliminate the defenses of contributory negligence and assumption of risks. *Ib.*

9. ———: **Measure of Damages: Diminution by Contributory Negligence.** And where, under the Boiler Inspection Act and the facts, contributory negligence is eliminated from a case brought under the Federal Employers' Liability Act, an instruction on the measure of damages which excludes any diminution of damages on account of the alleged contributory negligence of the deceased fireman, is not erroneous. *Ib.*
10. ———: ———: **Conscious Physical Sufferings.** Since the amendment of 1910 to the Federal Employers' Liability Act, the plaintiff may recover for the conscious bodily sufferings of the deceased fireman after his exposure to danger and before his death. *Ib.*
11. **Negligence: Inclusion of Specific Allegation.** Where the petition alleges that the conductor of a street car, which had stopped at an elevated station to take on passengers, caused said car to start forward, "and before plaintiff was able to get into the vestibule of said car or on the platform of said car, and while yet standing on the steps of said car with one foot, the conductor closed the door of said car while same was moving, pushing plaintiff off the step and, as a result thereof, plaintiff was thrown violently from said car to the street below," an instruction requiring the jury to find that the "conductor negligently caused said car to start forward and negligently closed the door of said car while said car was moving, and as a direct result thereof the plaintiff was thrown from said car to the street below and injured" omits no specific allegation. In requiring the jury to find that plaintiff was "thrown from" the car it used words of like significance as the allegation "pushed plaintiff off said car." *Pietzuk v. K. C. Rys. Co., 135.*
12. ———: **Physical Impossibility: Peremptory Instruction.** The evidence in this case does not show that it was a physical impossibility for the plaintiff to have been injured in the manner claimed by him and his witnesses, and therefore the trial court did not err in refusing to give to the jury a peremptory instruction to find for defendant. *Ib.*
13. **Legal Age: Subsequent Wages: Law of Forum.** Where the little girl was injured in Kansas and sues for common-law damages in Missouri, the law of the forum governs, and therefore an instruction authorizing the jury to allow her to recover for impaired ability to earn money "after she becomes of legal age," without proving what is the legal age in Kansas, is not erroneous. *Hill v. K. C. Rys. Co., 193.*
14. **Mental Anguish: Physical Deformity.** Where the little girl's left arm was cut off just below the elbow, her left foot was off back

INSTRUCTIONS—Continued.

- to the heel, the big toe and the one next to it of the right foot were off, and the third toe was broken and bent out and under the foot in a hook shape, there was sufficient evidence for an instruction telling the jury to allow her damages for any mental anguish she had suffered or would hereafter suffer; for these injuries were permanent, and mental anguish may be the outgrowth of them as the years come and go. *Hill v. K. C. Rys. Co.* 193.
15. **Negligence: Humanitarian Rule: Concurrent Acts: Pleading and Instruction.** The facts constituting negligence under the humanitarian rule may be pleaded with other negligent acts in the same count of the petition, and recovery be had upon the negligence covered by the humanitarian rule, and the instruction may omit all other acts of negligence. Plaintiff is not required to prove all acts of negligence pleaded, if those proven authorize a recovery under the humanitarian rule and the instruction properly submits them. *Ib.*
 16. **Alienation: Conduct Calculated to Prejudice: Omission of Words Cause to Separate.** In an action for damages for the alienation of the affections of plaintiff's husband, in which the petition charged that defendant caused plaintiff's husband to separate from her, prevented communication between them and maliciously prevented a reconciliation, an instruction declaring that "if defendant was intentionally guilty of such conduct as was calculated to prejudice plaintiff's husband against plaintiff and to alienate him from her and to prevent a reconciliation between them, and that plaintiff was thereby deprived of the society, companionship, comfort, protection, aid and affection of her husband, your verdict will be for plaintiff," was not error; and where said instruction as asked declared that "if defendant was guilty of such conduct as was calculated to cause their separation and to alienate the affections," etc., "and did cause him to separate from and abandon plaintiff," its modification by the court so as to omit the words "cause their separation" and "did cause him to separate and abandon plaintiff," the giving of it with these words omitted was not prejudicial error against defendant. *Hollinghausen v. Ade*, 362.
 17. **——: Calculated to Cause.** It is enough that the instruction require that defendant's conduct was calculated to cause plaintiff's husband to separate from her, and to prevent a reconciliation between them, without requiring that it "actually did" cause the separation and prevent the reconciliation. If by the intentional interference of defendant with the marital relations of her brother and his wife, the wife is deprived of the companionship of her husband, she is entitled to a verdict for alienation. A modification of the instruction so as to require the jury to find that defendant's conduct "actually did cause him to separate from and abandon plaintiff" was not necessary; but it is a modification of which defendant cannot complain. *Ib.*
 18. **——: Caused by Plaintiff: Unpleaded.** In an alienation case, an instruction telling the jury that if plaintiff herself by her conduct caused her husband to separate from her, the verdict must be for defendant, being an issue not pleaded, should be refused. *Ib.*
 19. **Assumption of Fact.** An instruction beginning, "If you find false statements were knowingly made," does not assume as a fact that such statements were made. *Morrow v. Franklin*, 549.

INSTRUCTIONS—Continued.

20. **Fraud and Deceit: Corporation: Presumptive Knowledge of Directors.** In an action for fraud and deceit brought against the president of a trust company for fraudulent representations in the sale of its stock, at a price far above par, at a time when it was in fact insolvent and its stock had been given a fictitious book value, it is not erroneous to instruct the jury that "it is the duty of a director of a trust company to ascertain the value of its assets and the amount and extent of its liabilities, and the law presumes that a director is familiar with the surplus and profits and the intrinsic value of its assets and the amount of its liabilities." The statute (Secs. 1131, 1133, R. S. 1909) imposes upon directors of trust companies the duty of knowing their exact status, and the law presumes that they perform that duty. Besides, in this case, such instruction, if technically erroneous, was harmless, because defendant in a letter to plaintiff, prior to the sale of the stock, said he had "inside knowledge of the affairs of the company." *Ib.*
21. **Demurrer.** If the defendant was not guilty of negligence, or if its negligence was not the proximate cause of plaintiff's injury, or if the plaintiff herself was guilty of contributory negligence as a matter of law, she has no cause to submit to the jury, and, defendant having asked a demurrer to the evidence, which was refused, no error in the instructions need be considered on appeal, for in such situation there could be no reversible error in any instructions given or refused for either party. *Waldmann v. Skrainka Const. Co.*, 622.

INSURANCE.

1. **Life Insurance: Suicide: Laws of California: Valid Provision.** Where the substantive rights of the parties are governed by the laws of California, where the parties resided, the life insurance policy was made and delivered and the insured died, a provision in the policy that it should be void in case the insured committed suicide is valid, in a suit brought on the policy by the beneficiary in the courts of Missouri, there being no statute of California prohibiting or making void such a provision. *Parker v. Aetna Ins. Co.*, 42.
2. ———: ———: **Burden of Proof.** Where an ordinary life insurance policy contains a valid provision that if the insured shall within one year commit suicide, sane or insane, then such policy shall be null and void, the burden of proof that the insured did commit suicide is upon the insurance company, for suicide is an affirmative defense that must be both pleaded and proved; and though the policy contains the provision that suicide, "sane or insane," shall avoid the policy, the burden still rests upon the company to show that the insured designedly, and not accidentally, killed himself, for suicide is the act of designedly destroying one's own life. *Ib.*
3. ———: ———: **Peremptory Instruction: Circumstantial Evidence.** Where the evidence as to the manner of the insured's death is wholly circumstantial, suicide cannot be declared by the court, as a matter of law, unless the circumstances exclude every reasonable hypothesis except suicide. *Ib.*
4. ———: ———: **Plaintiff's Admissions: Wholly Circumstantial.** The answer to the contention that the evidence of the manner in

INSURANCE—Continued.

which the insured took his own life is not all circumstantial, because the plaintiff herself admitted that the insured committed suicide, is her denial that she ever made such admission. Besides, her admissions to that effect in the proof of death made to other companies, and in statements by her on other occasions, if made, are but conclusions drawn from the circumstances surrounding the insured's death, and are not absolutely binding upon the jury, but it is the duty of the jury to arrive at the ultimate fact as to whether or not the insured did commit suicide, from all the facts and circumstances, including the admissions, if any, made by her; and the weight to be attached to her admissions, in view of her hysterical condition, at the time she witnessed the tragedy and when she is said to have made such admissions, is likewise a question for the jury. *Parker v. Aetna Ins. Co.*, 42.

5. **Life Insurance: Suicide: Drunken Man.** Where the discharge of the automatic pistol may as well have happened from the careless conduct of a drunken man as from an intentional act, and a door shut off from view the exact manner in which the pistol was discharged and prevented definite knowledge, and everything in his business and conduct prior to the time he became intoxicated indicated a purpose to press forward with energy, it cannot be ruled that all reasonable men would agree that the undisputed facts and circumstances exclude every reasonable hypothesis except suicide. *Ib.*
6. ———: ———: **Presumption.** Where the facts and circumstances are made to appear in evidence, the presumption against suicide, as a presumption of law, disappears, but as a presumption of fact it is and must ever be present with all reasonable men whose duty it is to pass upon the ultimate fact of suicide or accident, where the evidence is all circumstantial. *Ib.*
7. ———: ———: **Instruction: Obscured by Matters Unnecessary to Prove.** An instruction for plaintiff telling the jury that plaintiff is entitled to recover unless they further find that the insured committed suicide, and others for defendant requiring a verdict for defendant if they find he did commit suicide, are not contradictory, should be read together, and clearly present the issue of suicide; and that issue, being the only contested one throughout a long trial, is not submerged or in any wise obscured by the fact that plaintiff's instruction includes matters which plaintiff was not absolutely required to prove, such as whether all premiums required to keep the policy in force had been paid, and that defendant failed to furnish blanks for proof of death and denied liability. *Ib.*
8. **Evidence: What Witness Thought: Corrected.** It is not improper to strike out the answers of a witness beginning with, "I understand," "I thought," "I think," etc.; but if there is any error in striking them out, appellant cannot complain when the same answers were brought before the jury, in their full comprehensiveness, by respondent's evidence on cross-examination. *Ib.*
9. ———: **Powder Burn; Distance of Pistol from Wound: Non-Expert Matter.** The witness, after stating that the wound in the deceased's forehead was very dark and looked like a powder-burn, and that for five years he had investigated wounds caused by fire arms and had probably investigated more than a hundred murders and suicides, was asked to state whether he was able to state, from

INSURANCE—Continued.

the condition of the wound and the discoloration, where the muzzle of the pistol was with reference to the head at the time it was discharged. He answered that he could not "tell absolutely; I cannot tell in inches where the gun was." Asked for his best judgment, he replied that his judgment from the condition of the wound, was that "the distance was very close to the head, within a foot—twelve inches," and this last answer, over appellant's exception, was stricken out. *Held*, that the witnesses had stated all the facts on which his conclusion was based, the distance from the wound when the pistol was fired was not a matter of expert knowledge, the jury could determine the distance as well as could the witness, and no error, certainly no reversible error, was committed in excluding that part of the answer stricken out. *Ib*.

10. ———: **Inference: Happy Life: Conclusion: Waiver.** In a suit on a life insurance policy, where the defense is suicide, testimony that the home of the insured was a very happy one, that he and his wife and children were very devoted to each other, that he was very cheerful and optimistic, and that from observation and experience in seeing him he had a very happy outlook on life, is not to be considered as mere conclusions of the witnesses, but an inference necessarily involving certain facts which may be stated without the facts, the inference being equivalent to a specification of the facts. And where appellant's counsel, on cross-examination of the witnesses, and of plaintiff and other witnesses, proved the same inferences, the testimony in no way injured appellant's cause, and no reversible error could in any event be predicated upon its admission. *Ib*.
11. **Action at Law: Equitable Defense: Subrogation: Destroying Action.** To convert an action at law into a suit in equity the matter set up in the answer as constituting the equitable defense must, taken as true, destroy plaintiff's right to recover, and must ask for affirmative relief on that ground. *State ex rel. Ins. Co. v. Reynolds*, 382.
12. ———: ———: **Action on Insurance Policy: Subrogation to Plaintiff's Right.** Where the trustee and mortgagee brought action on a fire insurance policy, which contained a rider to the effect that, when the company shall pay the loss to the trustee or mortgagee and claim no liability to the mortgagor existed, it shall be legally subrogated to the rights of the party to whom the payment is made, said rider did not purport to destroy the plaintiffs' legal action on the policy as their interest might appear, and a plea of its provisions in defendant's answer, which also denied liability on the policy, did not convert the action at law into a suit in equity. *Ib*.
13. ———: ———: ———: ———: **No Payment.** Where the trustee and mortgagee bring suit on a fire insurance policy, which contains a clause that the company, upon paying the loss to them, may be subrogated to all their rights under any securities executed by the mortgagor and held by them, a plea asking that defendant be so subrogated is unavailing, and so far as the plaintiffs are concerned states no equity, if the defendant has neither paid plaintiffs' demand nor paid the amount thereof into court for their benefit. There can be no subrogation to a plaintiff's rights until his demand has been paid. *Ib*.

INSURANCE—Continued.

14. **Action on Policy: Brought by Trustee and Mortgagee: Bringing in Mortgagor.** In an action at law on a fire insurance policy brought by the trustee and mortgagee for the amount of the insurance upon the mortgaged property, it is not proper to require the mortgagor or his grantee to appear and plead to plaintiff's cause of action, since they are not only unnecessary parties, but have no interest in the controversy between the plaintiffs and the defendant insurance company. *State ex rel. Ins. Co. v. Reynolds*, 382.
15. ———: ———: ———: **Concealment of Real Owner: Knowledge of Company: Action at Law.** Property was conveyed to Martin and the deed recorded, and a fire insurance policy was issued to him as the insured; immediately thereafter, by an unrecorded deed, Martin conveyed to Krupnick, who was in fact the beneficial owner, and who executed certain notes to one of the plaintiffs and secured them by a deed of trust to the other as trustee, and said trustee and the payee of the notes bring suit on the policy. Defendant, by answer, prayed that Martin and Krupnick be made parties defendant, and pleaded that the policy was void because of the concealment from defendant of lack of title in Martin and of the interest of Krupnick. Being made parties, Martin disclaimed any beneficial interest and averred that the property was conveyed to him for the purpose of having its conveyed to Krupnick; Krupnick pleaded that he was the owner of the real estate, subject to the deed of trust; that defendant had full knowledge of all the facts before and after said policy was written, and with such knowledge received and retained the premium, and that by reason of such knowledge the policy was not void. In its counter-plea, defendant denied it had said knowledge. *Held*, that these issues were purely legal in their nature and triable by a jury; and that the action on the policy was not converted into a suit in equity, by a further plea by defendant that it was subrogated, by the terms of the policy, to the mortgagee's right to the notes executed by Krupnick, for such plea did not purport to destroy Krupnick's right of action, and even if it had it would have been unavailing, because defendant had not paid plaintiff's demand. *Ib.*
16. ———: ———: ———: ———: **Waiver: Authority of Agent: Facts upon Certiorari.** Upon certiorari to the Court of Appeals, in which it was ruled that the defendant insurance company was charged with whatever knowledge was acquired by its inspector a few weeks after the policy was issued, it will not be held by the Supreme Court that the facts shown in evidence were not sufficient to establish such knowledge or the inspector's authority to waive any concealment by the insured of the true ownership of the insured property, where, upon the partial facts recited in the opinion of the Court of Appeals, no ground for quashing its judgment appears, the entire evidence being presumably before the Court of Appeals, and only such portions of it can be considered by the Supreme Court as appear from its opinion. *Ib.*

INTEREST.

- Equitable Partition: Cotenant Out of Possession: Interest on Rents Claimable: Demand.** Where no wrong is committed in acquiring or retaining money a demand therefor is necessary in order that interest may be charged thereon, and interest can be collected only from the date of the demand. The judgment of the probate

INTEREST—Continued.

court admitting a will to probate is binding upon all the world until set aside by a suit to contest the will; and where such suit was instituted by a cotenant out of possession against a devisee of land named in the will and the will was set aside, but no demand for rents and profits was made in her petition, and she at no time pending that suit applied for a receiver or administrator *pendente lite*, or otherwise made a demand for her share of the rents, she is not entitled to interest on the rental value of her proportionate share of the land prior to the time she instituted her suit for equitable partition, but only from the date such partition suit was instituted. *Byrne v. Byrne*, 109.

INTERSTATE COMMERCE. See **Railroads**.

JUDGMENTS.

1. **Will: Annulment: Rights of Legatees.** When a will is finally set aside by the judgment of the Supreme Court, all rights of the legatees under the will cease, and their rights to the property devised by it must be determined as if the testator had died intestate, except as to such prima-facie rights as they acquired by the formal probate of the will in the first instance in the probate court. *Byrne v. Byrne*, 109.
2. **Effect of Final Settlement.** A final settlement made in the probate court in accordance with the directions of a will, duly probated, does not, when the will is annulled in a contest proceeding, bar an inquiry into the rights of the cotenants, in an equitable partition, to the personal property distributed in accordance with such final settlement; for it was made subject to be set aside and annulled in case of a successful contest of the will, and the will being set aside the amount of money, shown by said final settlement to have been distributed to the legatees must be brought into hotch-pot, as advancements to them, and distributed among the heirs as if the testator had died intestate. *Ib.*
3. **Jurisdiction: Against Guardian: Suit Against Restored Ward: Collateral Attack.** Where judgment has been obtained in the probate court against the guardian of an insane person, and before payment such person is adjudged restored to his right mind, the creditor may bring suit in the circuit court against such restored person for the amount of his claim and obtain judgment against him; for by the express words of the statute where an insane person is adjudged restored to his right mind, the administration upon his estate in the probate court immediately ends, and the jurisdiction of that court over him and his estate is terminated, and he is subject to suit on any valid claim the same as any other person. And the fact that the petition for judgment in the circuit court recited an allowance by the probate court against his guardian on the same claim while he was yet insane, and asked for judgment for the amount of the allowance with interest from its date, alleging that said allowance constituted an indebtedness of the defendant, did not deprive the circuit court of jurisdiction of the suit, or render the judgment invalid, for whether the facts stated constituted a cause of action was a question for the circuit court to decide, and in a collateral proceeding that question is immaterial and the ruling at most erroneous, for the failure of a petition to state a cause of action does not affect jurisdiction. And in a suit by a purchaser under said judgment to quiet title

JUDGMENTS—Continued.

brought against the defendant therein, said judgment cannot be held to be invalid on the theory that the allowance in the probate court was a judgment *in rem* against the defendant's estate and the judgment in the circuit court was one *in personam* against him personally. [Disapproving *Johnson v. Kaster*, 199 Mo. App. 501.] *Sidwell v. Kaster*, 174.

4. **Erroneous Judgment: No Supersedeas: Execution: Title of Purchaser.** Where the judgment of the circuit court in an action for debt was for plaintiff and was not void, but only erroneous, and on writ of error without a *supersedeas* staying execution was reversed, but before said writ issued execution was issued and levied on defendant's land, the purchaser at such sale, if a stranger to the proceeding, takes the title, which is in no way impaired by such reversal. *Ib.*
5. **Procured by Fraud: Knowledge of Suit Pending.** A plaintiff should be held responsible for any fraud in law, fraud in fact, deception or mishap, which was occasioned by his acts or the acts of his counsel. Where a plaintiff employed one attorney to bring suit by personal service against a non-resident and another attorney to bring suit by publication for the same land in the same court at the same term and the order of publication was published in an obscure paper away from the county-seat, and to the first suit the defendant appeared, filed a motion requiring plaintiff to give bond for costs, which being sustained and no bond being filed, the suit was dismissed, the judgment rendered by default in the second suit, the defendant having no knowledge thereof, should be set aside at the suit of said defendant or his grantee. Although the attorney in the one suit knew nothing about the other suit having been brought, the plaintiff in both must be held responsible for everything either of them knew, for in law he knew whatever they knew, and his act was not only a fraud upon the defendant, and tricked him out of his defense to the second suit, but was a fraud upon the court who rendered the default judgment therein. *Marley v. Land & Mfg. Co.*, 221.
6. **Joint Tortfeasors: Judgment Against One: Dismissal as to Other.** Where in a suit for damages for the alienation of the affections of plaintiff's husband, brought against his sister and her husband, as joint tortfeasors, the court at the close of the evidence sustained a demurrer offered by the defendant husband, and the jury brought in a verdict against the remaining defendant, in pursuance to instructions applicable to her alone, it was not error to permit plaintiff to dismiss as to the defendant husband and to enter a judgment of dismissal as to him, and to enter judgment against the defendant wife in accordance with the verdict. *Hollinghausen v. Ade*, 362.

JUDICIAL SALE.

1. **Homestead: Sale by Probate Court: Collateral Attack.** Under the Homestead Act of 1895 (Sec. 3620, R. S. 1899) and the Homestead Act of 1907 (Sec. 6708, R. S. 1909), the probate court had no jurisdiction to order the homestead of a deceased householder to be sold to pay his debts not legally charged thereon in his lifetime, where he left a wife and surviving children; but such a sale was an absolute nullity and void, and being such it can be nullified in a collateral proceeding. *Dennis v. Gorman*, 1.

JUDICIAL SALE—Continued.

2. ———: ———: **Act of 1907.** The Homestead Act of 1907 (Sec. 6708, R. S. 1909) gave to the probate court no more jurisdiction to order the sale of the homestead of a deceased householder who left children him surviving that did the Act of 1895 (Sec. 3620, R. S. 1899). By the said Act of 1907, it is only in case the heirs of the husband "be persons other than his children" that the probate court has powers or jurisdiction to order the sale of his homestead to pay debts not legally charged thereon in his lifetime. Not even when one of his heirs is a grandchild, there being children, can the homestead be sold; for the Act of 1907 means that it is only in case all the husband's heirs are "persons other than his children" that his homestead can be sold to pay his debts not expressly charged thereon in his lifetime. *Ib.*
3. **Conveyance: Patent Clerical Error: Recognition in Suit to Quiet Title: Omission of Word Quarter.** The recognition of a patent clerical error or omission in the construction of a deed is not a reformation of it; and where the judgment in a tax suit properly described the land as the southwest quarter and the northeast quarter of Section 36, and the sheriff's deed recites that the judgment described the southwest quarter and the northeast quarter of Section 36, and then says that named persons were the highest bidders for the "southwest quarter and northeast of Section 36" and that said last above described tracts were stricken off and sold to said named persons, it is clear that the omission of the word "quarter" after the word "northeast" was a patent clerical error, and that said deed, when read as a whole, conveyed 320 acres to said purchasers; and their subsequent grantee, in his suit to quit title, is, without bringing suit in equity to reform the deed, entitled to judgment for the 320 acres, and not simply to 160, as the trial court ruled. *Marley v. Land & Mfg. Co.*, 221.

See, also, **Writ of Error.**

JURIES AND JURORS.

Prejudice: No Challenge or Objection. Where the juror on his *voir dire* examination was not challenged, and no objection was made to his competency or qualifications, an objection first appearing in the motion for a new trial that he was prejudiced against appellant cannot be considered on appeal. And in this case had the juror been timely challenged on the facts disclosed by the affidavits filed in support of the motion for a new trial, such challenge should have been overruled. *Pietzuk v. K. C. Rys. Co.*, 135.

JURISDICTION.

1. **Cause of Action.** The mere failure of a petition to state a cause of action does not deprive the court of jurisdiction. *Sidwell v. Kaster*, 174.
2. **Suit Against Insane Person.** The probate court does not have exclusive jurisdiction of suits against insane persons; the circuit court also has jurisdiction of suits founded on claims against an insane person, whether they arose before or during guardianship. [Disapproving *Johnson v. Kaster*, 199 Mo. App. 501.] *Ib.*
3. **Judgment Against Guardian: Suit Against Restored Ward: Collateral Attack.** Where judgment has been obtained in the probate court against the guardian of an insane person, and before pay-

JURISDICTION—Continued.

ment such person is adjudged restored to his right mind, the creditor may bring suit in the circuit court against such restored person for the amount of his claim and obtain judgment against him; for by the express words of the statute where an insane person is adjudged restored to his right mind, the administration upon his estate in the probate court immediately ends, and the jurisdiction of that court over him and his estate is terminated, and he is subject to suit on any valid claim the same as any other person. And the fact that the petition for judgment in the circuit court recited an allowance by the probate court against his guardian on the same claim while he was yet insane, and asked for judgment for the amount of the allowance with interest from its date, alleging that said allowance constituted an indebtedness of the defendant, did not deprive the circuit court of jurisdiction of the suit, or render the judgment invalid, for whether the facts stated constituted a cause of action was a question for the circuit court to decide, and in a collateral proceeding that question is immaterial and the ruling at most erroneous, for the failure of a petition to state a cause of action does not affect jurisdiction. And in a suit by a purchaser under said judgment to quiet title brought against the defendant therein, said judgment cannot be held to be invalid on the theory that the allowance in the probate court was a judgment *in rem* against the defendant's estate and the judgment in the circuit court was one *in personam* against him personally. [Disapproving *Johnson v. Kaster*, 199 Mo. App. 501.] *Sidwell v. Kaster*, 174.

LANDLORD AND TENANT.

1. **Steps to Double Flat: Repair: Duty of Landlord.** Whenever the owner of a house demises a portion of it to which access is had by wall of halls, stairways or other approaches to be used in common with the owner or tenants of other portions of the same, the owner, by such transaction, retains as to the tenant the possession and control of such undemised facilities and it is his duty to keep them or to use reasonable care to keep them in safe condition for the use of the tenant in the enjoyment of his possession. Where there was a double flat house, consisting of an upper and lower story and fronted by a common one-story porch, from which a single set of steps led down to the granitoid walk, the owner of the house, having leased the two stories to different tenants from month to month, for residence purposes, retained such possession and control of the steps as made it his duty to keep them or to use reasonable care to keep them in a safe condition for the use of both tenants. *Roman v. King*, 641.
2. ———: ———: ———: **Invitation to Use.** One who invites another to come upon his premises is bound in law to see that those premises are in such condition that the invitation may be safely accepted; and a lease, by which the landlord, by the very act of leasing them, retains the control and possession of the undemised steps leading into a double flat used for residence purposes by different tenants, is an invitation to such tenants to enter the flat by such steps, and it is his duty to so maintain them that each of the tenants can enter the flat in safety, and if he neglects to so maintain them he is liable for any injury to the tenant caused by such unsafe condition. *Ib.*

LANDLORD AND TENANT—Continued.

3. ———: ———: ———: **Eviction.** The refusal of a landlord to maintain entrance steps to his double flat house used by his tenants from month to month for residence purposes, in such condition that they may enter and depart in safety, is a method of wrongful eviction. *Ib.*
4. ———: **Knowledge of Unsafe Condition: Continued Use: Contributory Negligence.** The use by a tenant of the front steps to a double flat leased to different parties from month to month for residence purposes, after knowledge of their dangerous condition, is not of itself conclusive evidence of lack of due care, since such knowledge does not require the tenant to desist from using them in a careful manner, nor render a careful use of them contributory negligence. The law does not encourage the wrongdoer to interpose his wrong as a defense against one who has suffered from its effects. The law will not compel a tenant, without good reason, to abandon her front door, the full and free use of which in safety is included in her monthly rental, and make use of a safe set of back steps. *Ib.*
5. ———: **Repair of Other Steps: Evidence.** Plaintiff sued her landlord for personal injuries due to the unsafe and rotten condition to the front entrance steps to a flat, one story of which she had leased. Some time previously the defendant had employed a carpenter to repair the back steps, and this carpenter took to defendant a note on which plaintiff had written: "All work is done right." There was no evidence connecting the paper with the subject of the suit, while the testimony of defendant shows affirmatively that there was no such connection. *Held*, that the admission of the paper in evidence was prejudicial error against plaintiff. *Ib.*
6. ———: **Meddling With Loose Step: Contributory Negligence.** For the tenant to move the loose end of a wooden step—loose because the wooden carrier is rotten—six or seven inches, and then to put it back in the position it had occupied before, or to pick it up and show it to her neighbors and then to put it back where it was before, does not constitute an act of negligence, and does not fix upon such tenant responsibility for her injury when, subsequently, in descending the steps, said step slipped from under her foot and thereby she was thrown to the ground; and an instruction which tells the jury that such acts constitute contributory negligence which bars her recovery of damages from her landlord for such injuries is in effect a peremptory instruction to find for defendant, and is highly prejudicial to her. It is not the law that if the tenant meddles with a step leading to her leased premises in the interest of her own safety, the owner is released from all liability for negligence in creating a situation so dangerous that safety required its correction. *Ib.*
7. ———: **Duty of Landlord and Tenant: Negligence.** It is the duty of the landlord to exercise reasonable care to keep entrance steps to a double flat building in a safe condition for the use of the tenant of one of the stories and of all persons having social or business relations with her, and she is entitled to the free and constant use of the steps as a necessary adjunct to the enjoyment of the leased premises, and the law does not require her to cease that enjoyment the moment the landlord chooses to permit the steps to become dangerous, but she may continue to use them, the

LANDLORD AND TENANT—Continued.

exercise of reasonable care to be determined in view of the extent and nature of the danger created by the owner's neglect or refusal to perform his duty, and if upon due notice or with knowledge of the dangerous condition he fails to make necessary repairs and she is injured by said unsafe condition she is entitled to recover from him her damages. *Roman v. King*, 641.

LANDS AND LAND TITLES.

1. **Homestead Act: Liberally Construed.** The homestead laws create a special statutory estate not governed by the general laws of descent and distribution. Their purpose was to afford a safe anchorage for a man and his wife and children against financial stress and storm, and accordingly are to be liberally construed in their favor and against creditors. But they cannot be construed beyond their evident intent. *Dennis v. Gorman*, 1.
2. **Homestead: By What Law Fixed.** The rights of the widow and children and of the creditors in the householder's homestead are fixed and determined by the law in force at the time of his death. Where he died October 15, 1907, the rights of his widow, children, grandchildren and creditors were fixed by the Act of 1907, which is the same as Section 6708, Revised Statutes 1909. *Ib.*
3. —: **Sale by Probate Court: Collateral Attack.** Under the Homestead Act of 1895 (Sec. 3620, R. S. 1899) and the Homestead Act of 1907 (Sec. 6708, R. S. 1909), the probate court had no jurisdiction to order the homestead of a deceased householder to be sold to pay his debts not legally charged thereon on in his lifetime, where he left a wife and surviving children; but such a sale was an absolute nullity and void, and being such it can be nullified in a collateral proceeding. *Ib.*
4. —: —: **Act of 1907.** The Homestead Act of 1907 (Sec. 6708, R. S. 1909) gave to the probate court no more jurisdiction to order the sale of the homestead of a deceased householder who left children him surviving than did the Act of 1895 (Sec. 3620, R. S. 1899). By the said Act of 1907, it is only in case the heirs of the husband "be persons other than his children" that the probate court has power or jurisdiction to order the sale of his homestead to pay debts not legally charged thereon in his lifetime. Not even when one of his heirs is a grandchild, there being children, can the homestead be sold; for the Act of 1907 means that it is only in case all the husband's heirs are "persons other than his children" that his homestead can be sold to pay his debts not expressly charged thereon in his lifetime. *Ib.*
5. —: **Abandonment by Wife and Children: Sale to Pay Debts.** The fact that the widow and children left the homestead and moved to another county after the homesteader's death did not increase the jurisdiction of the probate court to order it sold to pay his debts not expressly charged thereon in his lifetime. The rights of his children become vested in them as remaindermen in fee upon his death, and there is nothing in the statute requiring them to continue to reside on the property or forfeit their title. *Ib.*
6. —: **Grandchild: Right to Fee.** The householder having died leaving two children, one of them a minor, and a grandchild, and

LANDS AND LAND TITLES—Continued.

the statute saying that the homestead can only be sold to pay debts if the heirs of the husband were "persons other than his children," the attempted sale of the homestead under orders of the probate court was void, not only as to the two children, but as to the grandchild as well. *Ib.*

7. ———: **Sale: Estoppel.** Where the children knew nothing of the administratrix's sale of the homestead, ordered by the probate court to pay decedent's debts, and received none of the proceeds, and the widow refused, as administratrix, to file a petition for its sale and it was filed by the creditors because of her refusal, the children are in no sense estopped to recover the homestead property, even though one of them was twenty-two years old at the time of her father's death, and the other twenty-two when the sale was made, and the widow used part of the proceeds in paying a balance due on the land. *Ib.*
8. ———: **Conveyance by Widow: Quarantine.** A quit-claim deed by the widow of a deceased homesteader conveyed all her rights therein, whether of homestead, dower or quarantine, and his children who had reached their majority continued to own the fee subject to the rights conveyed to her grantee. And if her homestead right has been extinguished by remarriage, the right to possession by the children, the youngest having become of legal age, is subject to the former widow's unassigned dower. *Ib.*
9. ———: **Grandchild: Right to Occupancy.** The minor grandchild of the deceased householder does not have the right of occupancy of his homestead jointly with his widow and children, even though she had been residing with him as a member of his family, her parents being dead. The right of occupancy is given by statute only to minor children of the householder, and that right ceases when the youngest reaches twenty-one years of age. But such grandchild has a remainder in fee in the homestead property as an heir of the homesteader. *Ib.*
10. ———: **Conveyance by Widow: Occupancy by Children: Unassigned Dower.** The right of the deceased householder's children to occupy his homestead, under the Act of 1907, ceased when the youngest of them reached twenty-one years of age, and where the youngest had reached that age at the time the widow conveyed her right and interests in the homestead, and she has since married, she no longer has a homestead right; but her grantee acquired her right of dower and quarantine until dower is assigned, and although the children are owners in fee their right to possession, the younger having reached legal age, is subject to the dower and quarantine of the former widow until dower is assigned. *Ib.*
11. **Conveyance: Testamentary Deed.** After the owner of land had signed and acknowledged a deed of gift in Illinois, conveying to her nieces her home in Springfield, Missouri, she handed it to one of them, saying, "You take this and put it in your box and keep it and whenever anything happens you send it to Springfield and have it recorded," the words "whenever anything happens" being further elucidated by the witness as being understood by him to mean "when she died." *Held*, that, although by this delivery the maker may be said to have parted with dominion over the deed,
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LANDS AND LAND TITLES—Continued.

her intention was that it should take effect upon her death; it was therefore testamentary in character, and did not pass a present interest in the property to the grantees. *Coles v. Belford*, 97.

12. **Conveyance: Testamentary Deed: Delivery: Intent.** In order to constitute a valid delivery the handing of a deed by the maker to one of the grantees must be done with the intent of passing an estate *in praesenti*, and if the giving of the deed into the hands of the grantee is not done with the intent of passing the title at the time there is no delivery in contemplation of law. *Ib.*
13. ———: ———: **Retaining Possession.** Retention of the management and control of property after a deed of gift conveying it to nieces is signed, acknowledged and handed to one of them, paying taxes and making improvements upon it, receiving the rents and placing it in the hands of an agent to be sold, by the grantor, are evidence that it was not her intention that the deed should take effect and pass title as a present transfer. *Ib.*
14. ———: ———: ———: **Self-Serving Evidence.** In a suit by heirs of the maker against the grantees to set aside a deed of gift, letters written by the grantor, after she had signed and acknowledged it, to a real estate agent, her banker and attorney, relating to the payment of taxes upon the property, the making of repairs and the sale thereof, are not merely self-serving statements, but competent cumulative evidence consistent with the oral testimony of the addressee, who detail facts showing her continued exercise of control over the property and her intention that the deed was not to become effective until her death. Besides, the grantees, having admitted in their answer that the grantor continued to control the property after the execution of the deed, cannot be heard to complain of such letters. *Ib.*
15. ———: ———: **Decree on Another Ground.** The decree of the trial chancellor cancelling and annulling a deed being correct will be upheld on appeal, although he reached that conclusion on the ground that the deed "was not executed and delivered," and the Supreme Court are of the opinion it was testamentary in character and therefore void. *Ib.*
16. **Will: Annulment: Rights of Legatees.** When a will is finally set aside by the judgment of the Supreme Court, all rights of the legatees under the will cease, and their rights to the property devised by it must be determined as if the testator had died intestate, except as to such prima-facie rights as they acquired by the formal probate of the will in the first instance in the probate court. *Byrne v. Byrne*, 109.
17. ———: ———: **Unassigned Widow's Dower: Quarantine.** Upon the annulment of the will of a householder, his widow, to whom dower was never assigned, was entitled, as her quarantine, to the possession of the mansion house and the messuages thereto belonging during her life, and to all rents and profits thereof, as if no will had existed. And where the home place consisted of 210 acres, of which ninety acres was devised to a son and the balance to the widow for life, the widow, upon the annulment of the will, was entitled to the possession of said ninety acres, as well as to the balance of the homestead, and during her life, no dower having been assigned, none of the testator's heirs had any legal claim to the rents or profits thereof. *Ib.*

LANDS AND LAND TITLES—Continued.

18. ———: ———: ———: ———: **Will Obtained by Widow's Undue Influence.** Although the appellate court sustained the verdict of the jury setting aside the will on the ground that it was the result of undue influence exercised by the widow upon the testator, she cannot be deprived of her dower and quarantine in the home place, for when the will was annulled the result was that the testator died without a will and intestate, and his heirs and widow were restored to their rights at law, and among the rights regained by the widow was her right to dower and quarantine. *Ib.*
19. **Equitable Partition: Improvements Made by Cotenant: Limitations.** An allowance to one tenant in common of the value of improvements made by him upon land brought into equitable partition is to be based upon the conditional and reciprocal right of the other cotenants, is not recognized at law at all but only in equity, and is governed wholly by equitable considerations, among them the maxim that he who seeks equity must do equity. The cotenant out of possession, who has received no benefit of the common estate, is entitled to offset or credit the rental value of his interest against the allowance for improvements made and taxes paid by the cotenant in possession, especially where the latter has received the rents and profits to the exclusion of his cotenants; and neither the claim for improvements nor the claim for rent is barred by the Statute of Limitations, nor does the question of limitations enter into the adjustment. *Ib.*
20. ———: ———: ———: **Excess of Rents.** Rents barred by the statute in an ejectment suit can only be used as a shield and not as a sword in chancery partition; only an equal amount of rental value can be allowed a cotenant out of possession against an allowance for improvements made by a cotenant in possession, and not the excess of rents over the value of the improvements. *Ib.*
21. ———: **Improvements Made Pending Will Contest.** In an equitable partition, the devisee named in a will, annulled after being probated, should be allowed for improvements made by him in good faith pending the will contest. *Ib.*
22. ———: **Cotenant Out of Possession: Rents Claimable: Improvements.** In equitable partition the cotenant out of possession is entitled to only the rental value of his interest in the land as the land would have been without improvements made thereon in good faith by the cotenant in possession. *Ib.*
23. ———: ———: **Interest on Rents Claimable: Demand.** Where no wrong is committed in acquiring or retaining money a demand therefor is necessary in order that interest may be charged thereon, and interest can be collected only from the date of the demand. The judgment of the probate court admitting a will to probate is binding upon all the world until set aside by a suit to contest the will; and where such suit was instituted by a cotenant out of possession against a devisee of land named in the will and the will was set aside, but no demand for rents and profits was made in her petition, and she at no time pending that suit applied for a receiver or administrator *pendente lite*, or otherwise made a demand for her share of the rents, she is not entitled to interest on the rental value of her proportionate share of the land prior to the time she instituted her suit for equitable partition, but only from the date such partition suit was instituted. *Ib.*

LANDS AND LAND TITLES—Continued.

24. **Equitable Partition: Personal Property: After Final Settlement.** Where the will, duly probated, is set aside in a contest proceeding, the personal property distributed among the legatees in accordance with the direction of the will and the orders of the probate court, should be brought into hotch-pot in an equitable partition, and each heir given his proportionate share thereof, as if there had been no will, and the amounts distributed to the favored legatees should be considered as advancements, which means that no interest is to be charged thereon. But where the testator's widow has died, the amount of money distributed to her, in accordance with the will, at and prior to the final settlement in the probate court, should not be brought into hotch-pot. *Byrne v. Byrne*, 109.
25. ———: ———: **Effect of Final Settlement.** A final settlement made in the probate court in accordance with the directions of a will, duly probated, does not, when the will is annulled in a contest proceeding, bar an inquiry into the rights of the cotenants, in an equitable partition, to the personal property distributed in accordance with such final settlement; for it was made subject to be set aside and annulled in case of a successful contest of the will, and the will being set aside the amount of money, shown by said final settlement to have been distributed to the legatees, must be brought into hotch-pot, as advancements to them, and distributed among the heirs as if the testator had died intestate. *Ib.*
26. ———: **Waste: Homestead.** In the equitable partition no allowance should be made against a cotenant who cut and sold cedar timber from the homestead, in which the widow had quarantine and no assignment of dower had been made therein, the evidence showing that she received the money for which the timber was sold and that the cotenant simply acted as her agent in cutting and selling it. *Ib.*
27. ———: **Taxes.** While cotenants who took possession of estate lands devised to them by their father's will, subsequently annulled in a contest proceeding, should, in an equitable partition, be charged with rents during the time they were in possession and up to the time of the partition sale, if they continue in possession up to said sale, they should be credited with any taxes they have paid or may pay prior to such sale. *Ib.*
28. **Erroneous Judgment: No Supersedeas: Execution: Title of Purchaser.** Where the judgment of the circuit court in an action for debt was for plaintiff and was not void, but only erroneous, and on writ of error without a *supersedeas* staying execution was reversed, but before said writ issued execution was issued and levied on defendant's land, the purchaser at such sale, if a stranger to the proceeding, takes the title, which is in no way impaired by such reversal. *Sidwell v. Kaster*, 174.
29. **Tax Suit: Trust Estate: Sale of Legal Estate.** Where the will, fairly construed, contemplated that the executors should divide the property between the widow and two sons, and that one of the sons should hold his brother's share until he became of age; there is nothing to show when said brother became of age; the will does not show when it was made; the testator died in 1883 and the administration of the estate closed in 1887; in 1891, after the death of the wife, suit for taxes was brought against both brothers, they were personally served, and in their answers asserted they

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were the owners of the land, and made no claim to a trust estate, it will be held, in a suit to quiet title, that the title passed to the purchaser at the sheriff's sale under the tax judgment, and that a subsequent purchaser from said brothers took nothing by his deeds. *Marley v. Land & Mfg. Co.*, 221.

30. ———: ———: **Estoppel.** Defendants in a tax suit, after filing their answer in which they assert they are the owners, will not be heard, on the ground of estoppel, to urge that the judgment in the tax suit was void and did not bind them, because the property was held by one of them as trustee for the other. Inconsistent positions cannot be taken where they work injury, and the purchasers at the tax sale had a right to rely upon defendant's answer filed in the tax suit, in which they alleged they were the owners. And a subsequent purchaser from said defendants stands in no better position than they do. *Ib.*
31. **Conveyance: Acknowledgment of Married Woman: Statute of 1855.** Where the statute (R. S. 1855, ch. 32, sec. 39, p. 363) required that the certificate of acknowledgment of a married woman shall set forth "that she executed the same freely and without compulsion or undue influence of her husband," a certificate reciting that the married women "executed and delivered the said deed freely and without compulsion of their said respective husbands" is sufficient, without using the words "undue influence." The statute requires no more than a substantial compliance with its terms, and is satisfied if the free and unconstrained consent of the wife to the deed is obtained. *Mathews v. O'Donnell*, 235.
32. ———: **Description: Reference to Grantor's Deed.** A conveyance by two married women and their husbands of "our undivided interest in a fractional piece of land deeded to us" by their grantor, "it being a part of the S. W. $\frac{1}{2}$ of the S. W. of Sec. 5, Twp. 50, Range 29," is a sufficient description, if the description of the land "deeded" to them by their grantor is sufficient. The office of a description is not to identify the land, but to afford the means of identifying it, and when this is done the description is sufficient. Where the grantors convey land deeded to them by a certain grantor and his deed to them had identified the tract, the description is sufficient. *Ib.*
33. ———: ———: **Undivided Interest: Exclusive Possession of Grantee.** Where land had been conveyed to two married women, and they and their husbands conveyed "our undivided interests" therein, the meaning is clear enough. Especially where the grantee took and retained exclusive possession of the tract conveyed, for this itself cured any defect in the description. *Ib.*
34. ———: **To Woman and Her Children: Fee or Remainder: Cotenancy: Settlement.** A deed conveying certain land to "F. A. D. Mathews and all her children she has now or ever may have," with the *habendum* reading: "To have and to hold the same unto the said F. A. D. Mathews and her children as aforesaid and their heirs, but it is to be distinctly understood if the said F. A. D. Mathews may hereafter conclude to sell the above tract of land she is hereby empowered and authorized to do so by arranging it so that the proceeds of said land is to be laid out for other lands or property to be conveyed so as to put the right of title in the

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said F. A. D. Mathews and her children," did not convey the fee to said F. A. D. Mathews, but only a vendable life estate, with remainder in fee in her children, born and unborn. She and her children were not made tenants in common, for it is clear that the grantor did not intend that the children should take a present interest, for he does not name them, and says "all her children she has now, or may ever have;" but the grant, when read in connection with the *habendum*, manifests a settlement, with a life estate to the mother and the remainder in fee to her children. *Mathews v. O'Donnell*, 235.

35. **Taxes: Payment: Duty of Life Tenant: Duty of Life Tenant's Grantee.** The payment of taxes upon improved and productive land is a charge upon the life estate, and it is the duty of the owner of such estate, whether the life tenant or his grantee be the owner, to pay the taxes and protect the interest of the remaindermen. *Ib.*
36. **Tax Sale: Deed to Life Tenant.** The purchase of land at its sale for taxes, by the life tenant or by the life tenant's grantee, inures to the benefit of the remaindermen, and operates only as a payment of the taxes. Such purchaser occupies a fiduciary relation to the remaindermen, and is bound to exercise every reasonable precaution to preserve the property intact for transmission to them upon the termination of the life estate. *Ib.*
37. ———: **Future Disposition: Purchaser With Notice: Deliberate Plan to Defraud Remaindermen.** Not only the life tenant who purchases land at a tax sale, but all persons who take title from him with notice of his violation of his fiduciary relation to the remaindermen, are trustees *ex maleficio*; and the record of title showing he had only a life estate is constructive notice to his grantee, and the tax deed informs such grantee that the life tenant had suffered the land to be sold for delinquent taxes which the law required him to pay. But the facts of this case show actual notice, and also a deliberate plan to deprive the remaindermen of their estate, by suit and sale for taxes. *Ib.*
38. **Conveyance: Purchase from Fraudulent Grantor: Notice: Failure to Testify.** The burden of proving a bona-fide purchase from a fraudulent grantor is on the party pleading it, and to support the plea he must prove that he bought without notice, and paid the purchase money without notice. And failure of such purchaser to testify creates an inference that he refrained because the truth would not aid his contention, and of itself affords strong evidence of the fraud. *Ib.*
39. ———: **Married Woman's Deed: After-Acquired Interest.** Under the statute of 1855 (R. S. 1855, sec. 36, ch. 32, p. 363) the deed of a married woman who owned only a life interest in land did not pass her interests subsequently inherited from the remaindermen. Prior to the Married Woman's Act of 1889, only whatever interest a married woman had at the time was conveyed by her deed, whatever its form. *Ib.*
40. **Limitations: Life Estate: Trustees Ex Maleficio.** Remaindermen cannot come into court and recover possession of land before the termination of the life estate, and no statute of limitations, that for thirty years or any other, begins to run against them until the life estate is determined by the death of the life tenant. And

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where the purchaser from the life tenant is a grantee with notice and a trustee *ex maleficio*, the statute does not run in his favor. Ib.

41. **Tax Sale: Surplus Money Paid to Life Tenant: Order of Court: Estoppel.** Where the life tenant, occupying a fiduciary relation to the remaindermen and under obligation to protect their estate, caused or allowed a suit for taxes to be instituted for the purpose of covinously defeating their title, his motion, sustained by the court, directing the sheriff to pay over to him the surplus money in his hands arising from the tax sale, will not estop them from claiming title. Such payment bars a renewal of any claim to the surplus fund, but it was not *res adjudicata* as to the remaindermen's title. Ib.
42. **Cancellation of Deed: Undue Influence: Parent and Son: Burden of Proof.** The simple relation of parent and child is not sufficient to justify the cancellation of a deed or lease from the parent to the son, but in order to authorize such cancellation there must be a further showing of the exercise of undue influence by the son, or the existence of fraud practiced upon the parent by him, or that some advantage was taken by the son of the parent's weak condition of mind; and where there is no evidence tending to show any relation of trust and confidence between the parent and son except that which exists between parent and child, the burden of showing fair dealing and the absence of undue influence does not shift to the son in her suit to set aside a conveyance of her farm to him. *Smith v. Smith*, 405.
43. ———: ———: ———: **Utmost Fairness.** Where the evidence shows that the utmost fairness characterized the dealings of a son with his mother and manifests a desire on his part to secure to her an adequate income from her farm, which she, because of old age and physical infirmities, was unable to operate, and to preserve the estate intact for himself and her other children, and further shows that, in pursuance to said desire, he took upon himself a burden that he alone of all her children was able to carry, which required the advancement of considerable sums of money and his personal attention for ten years or more before he could be reimbursed, there is no room for the contention that, in her suit to set aside the conveyance, the burden of showing fair dealing and the absence of undue influence shifted to him. Ib.
44. **Conveyance: Incapacity of Grantor: Expert Testimony: Exploded by Her Own.** In a suit to cancel a deed and lease made by a mother to her son, testimony of the mother at the trial, eight months after the instruments were executed, in which she clearly relates the conversations and agreement between herself and the son at and prior to their execution, is of itself sufficient to explode the testimony of medical experts to the effect that at the time the instruments were executed she was of unsound mind and incapable of entering into such contractual relations. Ib.
45. ———: **To Several Children: Acceptance by All.** Where the mother did not write in her deed to her children, intended as an advancement to each of them, that it should be void unless all of them accepted it, the law will not imply a condition of defeasance in case one or more of them fail to accept it; but as to the grantee

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to whom it was delivered and as to those who do accept it, it will be a valid conveyance, and as to those only who refuse to accept it will it be held void. *Smith v. Smith*, 405.

46. **Conveyance: To Several Children: Lease: Ratification.** Where a voluntary deed to a farm by a mother to her children was made subject to a cotemporaneous lease to one of them for ten years at an annual rental, her demand and acceptance of a part of the rental is an affirmation of the contract with said grantee and lessee, subject to the correction of mutual mistakes, and cannot be avoided as to him because four of the six children refused to accept the deed. *Ib.*
47. **Deed: Lease: Mutual Mistakes: Reformation.** Where the agreement between a mother and her son was that her farm should be leased to the son for ten years at a named annual rental, and in addition he was to pay the taxes and make needed improvements on the dilapidated farm and pay the interest on two existing mortgages and advance her whatever sum above the rental was necessary for her comfort, and he was to be reimbursed for all said outlay above the annual rental by an extension of said lease at the same rental for such a time as would reimburse him, and that a deed should be made to all her children as equal grantees, subject to said lease, and said agreements were not incorporated in either of said cotemporaneous instruments, and the son, in his answer to the mother's suit to have the deed and lease cancelled, asserts that such were the agreements and prays that the instruments be reformed to include them, the court should reform the deed so to make it subject to the lease and the mother's life estate, and reform the lease so as to extend it for such period as will meet the other terms of the agreement. *Ib.*

LEASE. See **Landlord and Tenant**.

LEGISLATURE.

1. **Inspection Fees: Presumption of Legislative Reduction.** An inspection law being otherwise valid and the amount of the fees to be charged being largely within the sound discretion of the Legislature, the presumption is that the Legislature, upon discovering that the fees authorized to be charged and collected largely exceed the probable costs of inspection, will reduce the fees, and the courts do not interfere, immediately upon application, upon a showing that the fees collected for the first two years after the enactment of the law largely exceeded the expense. *Cocoa Cola Co. v. Mosby*, 462.
2. **Legislative Enactment: Referendum: Power of Legislature to Prevent.** The General Assembly cannot prevent the reference of a legislative act to the people by referendum petition for their approval or rejection, by inserting in the act a section that the enactment is necessary for the immediate preservation of the public peace, health and safety, when it is not such in fact, nor by inserting such words in the act inhibit the court from determining whether it is subject to reference. [Per *WOODSON, J.*; *JAMES T. BLAIR, C. J.* and *WALKER, GRAVES and ELDER, JJ.*, concurring; *HIGBEE* and *DAVID E. BLAIR, JJ.*, dissenting.] *State ex rel. Pollock v. Becker*, 660.
3. **Referendum: Ousting Justice of Peace.** A legislative act which removes eight justices of the peace in one city; cuts down the

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number of justices and constables and provides for the appointment of others by the Governor, is not a bill for the immediate preservation of the public peace, health or safety, nor, as is shown by current history, of which the courts take judicial notice, were they enacted for any such purpose. And it is against all reason that the reference of such acts to the people can be prevented by inserting in them a section declaring that their enactment is necessary for the immediate preservation of the public peace, health and safety. [Per GRAVES, J.; BLAIR, C. J., and WALKER, J., concurring.] *Ib.*

4. ———: **Exception: Exercise of Police Power: Judicial Question.**

The clause of the Constitution which does not require a reference of legislative acts necessary for the immediate preservation of the public peace, health or safety is an exception to the otherwise universal reservation by the people of the power of referendum, and includes only those certain, definite and unquestioned phases of the police power which, in their very nature, may be and usually are emergent; and as the courts exercise jurisdiction to determine whether a legislative act is a valid exercise of the police power, it is also a judicial question whether a certain act, which attempts to cut off its reference to the people, is a valid exercise of the police power. [Per BLAIR, C. J.; WALKER and GRAVES, JJ., concurring.] *Ib.*

5. ———: **Legislative Finding: Conclusiveness.** The Constitution does not say that a legislative act shall be exempt from the referendum if the General Assembly shall declare it to be necessary for the immediate preservation of the public peace, health or safety, but the exemption is made to depend on the fact that the act is so necessary. [Per BLAIR, C. J.; WALKER and GRAVES, JJ., concurring.] *Ib.*

6. ———: **Exercise of Police Power: Judicial Question: Legislative Finding.** The question of fact whether a trade or calling is of such a nature as to render it subject to regulation or to particular regulations under the police power, is strictly a judicial question; and the court will hold invalid any legislative act which it finds does not touch the public good in such a way as to justify regulation of the calling or the particular regulation attempted, and it will do that in the face of the fact that the regulatory act involves a legislative finding that existing facts justify the attempted regulation. [Per BLAIR, C. J.; WALKER and GRAVES, JJ., concurring.] *Ib.*

7. ———: **Widening Police Power: Conclusiveness of Legislative Finding.** If a declaration in a legislative act that it is necessary for the immediate preservation of the public peace, health and safety is conclusive upon the courts, then the result is that Section 57 of Article IV of the Constitution empowers the Legislature to widen and extend the police power to include callings and regulations to which it could not have been extended prior to the adoption of said section, and to remove from the realm of judicial inquiry every question of fact pertaining to the scope and extent of a proper exercise of the police power; and, furthermore, it empowered the Legislature to defeat the reference of any and all bills, whether an attempted exercise of the police power or otherwise, by the mere inclusion of such a declaration in the bill, however false in fact it

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- may be. [Per BLAIR, C. J.; WALKER and GRAVES, JJ., concurring.] State ex rel. Pollock v. Becker, 660.
8. **Referendum: Legislative Error: Corrected by Another Error.** That part of said Section 57 pertaining to the reference to the people of laws enacted by the Legislature was designed to correct legislative errors; and if the Legislature errs by passing a bad act, it cannot cure that error by adding thereto another error, false on its face, that the act is necessary for the immediate preservation of the public peace, health and safety. [Per BLAIR, C. J.; WALKER and GRAVES, JJ., concurring.] Ib.
 9. ———: **Legislative Finding: Effect Upon Referendum and Courts.** If a legislative declaration inserted in a law that its enactment is necessary for the immediate preservation of the public peace, health and safety is conclusive upon the question of its referendum and prevents its reference to the people, it would likewise be conclusive upon the courts when they are called upon to consider the validity of the act as a proper and reasonable exercise of the police power. It is conclusive neither on the referendum nor upon the court. [Per BLAIR, C. J.; WALKER and GRAVES, JJ., concurring.] Ib.
 10. ———: **Purpose: Legislative Defeat.** The purpose of the referendum provision, expressed in an adopted constitutional amendment, was to provide an efficient method of checking and regulating legislative power, by providing that all legislative acts, except those necessary for the immediate preservation of the public peace, health and safety, may be referred to the people for their approval or rejection; and to hold that the Legislature may, in spite of the clear language used, determine, not only the extent to which the reserved power shall be used, but whether it may be exercised at all, would be to rule that the Legislature can violate the spirit of the provision and destroy its purpose. [Per WALKER, J.; BLAIR, C. J., and GRAVES, J., concurring.] Ib.
 11. ———: ———: ———: **Justice of Peace: Unlimited Exceptions.** If the Legislature may except from the operation of the referendum provisions of the Constitution acts abolishing justices of the peace, clerks and constables in designated townships and providing for the appointment of their successors, by simply declaring in the acts that their enactment is necessary for the immediate preservation of the public peace, health and safety, then a like exception may be effected by inserting said declaration in any act, regardless of the absurdity of its application, and thus the constitutional power intended to be reserved will be completely destroyed. [Per WALKER, J.; BLAIR, C. J., and GRAVES, J., concurring.]
 12. ———: **Justice of Peace: Public Peace, Health and Safety: Immediate Preservation: Absurdity.** Acts which apply to only one city in the State cannot be said to be "public" in the sense that word is used in the referendum clause of the Constitution; and if their purpose, as is apparent from their face, is to effect a change in the personnel in the offices of justices of the peace, clerks and constables in the townships of said city, and to define their duties and powers, it would be to violate reason, which is the life of the law, and to uphold an absurdity, to say they are necessary for the "immediate preservation" of the public peace, or the public health

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or the public safety, for those words imply an imminent danger, an impelling necessity, public disorders, and an unwholesome sanitary condition of the community at large. [Per WALKER, J.; BLAIR C. J., and GRAVES, J., concurring.] Ib.

13. ———: **Legislative Acts: Presumption of Right Action: Invasion: Judicial Interference.** Every intendment should be made in favor of the propriety of legislative action; but it is firmly fixed in American government that it is the province and duty of the judicial department to say what the law is, and that duty is more imperative under modern constitutions which do not invest exclusive legislature power in the legislature, but divide it between the legislature and the people, and place upon the court, in a proper case, the duty to determine whether the legislature's acts constitute an invasion upon the powers which the people in their Constitution have reserved to themselves. If a legislative act purports to be for the preservation of the public peace, health and safety, and its words and subject-matter have no relation to those subjects, and an analysis of it demonstrates that it is a palpable invasion of the powers reserved by the people, the courts will so decide, and preserve the constitutional right of referendum. [Per WALKER, J.; BLAIR, C. J., and GRAVES, J., concurring.] Ib.
14. ———: **Peace and Safety: Legislative Determination.** The mandate of the Constitution, coming directly from the people, is superior to the will of the Legislature; and while the Legislature, being invested with law-making power, must, in the first instance, decide whether an act is necessary for the immediate preservation of the public peace, health or safety, its determination that the necessity exists if in fact without substantial basis, is not final or conclusive. But if the act purports to have been adapted to meet an emergency which palpably, from its face, does not exist, it becomes the duty of the courts to take jurisdiction and give effect to the constitutional intent and purpose. [Per ELDER, J.; BLAIR, C. J., and WALKER and GRAVES, JJ., concurring.] Ib.
15. ———: ———: ———: **Construction by Oregon Court.** The ruling of the Supreme Court of Oregon, from which the initiative and referendum section of our Constitution was borrowed, that a declaration placed in a bill by the Legislature that its enactment is necessary for the immediate preservation of the public peace, health and safety is conclusive, is not binding upon the Supreme Court of this State, although such ruling was made before the constitutional section was adopted in this State. While such foreign construction is persuasive and entitled to respectful consideration, it is not binding, and will not be followed if the courts of the adopting state are of the opinion that it is erroneous. [Per ELDER, J.; BLAIR, C. J., and WALKER and GRAVES, JJ., concurring.] Ib.
16. ———: ———: ———: **Removal of Justice of Peace.** A declaration in a legislative act, abolishing in one township the offices of eight justices of the peace and constables, who from the record are presumed to be properly and efficiently discharging their official duties, and providing for the immediate appointment of other justices and constables, that its enactment is necessary for the immediate preservation of the public peace, health and safety, is not conclusive on the courts, and is not sufficient to prevent the

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- reference of said act to the people for their approval or rejection. [Per ELDER, J.; BLAIR, C. J., and WALKER and GRAVES, JJ., concurring.] *State ex rel. Pollock v. Becker*, 660.
17. **Referendum: Peace and Safety: Legislative Determination: Construction by Oregon Court: Binding.** When the people of Missouri adopted the referendum amendment from the Constitution of Oregon they adopted the construction which had previously been given it by the Supreme Court of that state just the same as if that construction had been written into the body of the amendment; and that court having ruled, prior to the adoption of the amendment in this State, that a declaration written into the body of a legislative act that its enactment is necessary for the immediate preservation of the public peace, health and safety is conclusive and final on the question of necessity, such ruling is binding on the courts of this State and compel a like ruling from them. [Per HIGBEE, J., dissenting.] *Ib.*
 18. ———: ———: ———: **Legislative Power: Coordinate and Independent Department.** The Constitution has solemnly vested the legislative power in the General Assembly, which is an independent and co-ordinate department of the government, answerable only to the people for the execution of the powers delegated to it, and the remedy for any abuse of that power, by fraud or trickery, is the ballot. Besides, a legislative act, which contains a section declaring that its enactment is necessary for the immediate preservation of the public peace, health and safety, may be submitted to the direct vote of the people by an initiative petition, so that there is no foundation for the suggestion that the Legislature, by inserting such a declaration in an act, may, by fraud and trickery, destroy the referendum or prevent legislation by the people. [Per HIGBEE, J., dissenting.] *Ib.*
 19. ———: ———: ———: **Oregon Construction.** When one state borrows a constitutional provision from another and the highest court of the State has authoritatively construed the provision prior to its adoption by such other, such provision is to be held as having been adopted with the construction thus, previously put upon it. The initiative and referendum amendment to the Missouri Constitution was borrowed from the Constitution of Oregon, and the decision of the Supreme Court of that State, made before its adoption here, that a declaration in an act of the Legislature that its enactment is necessary for the immediate preservation of the public peace, health and safety is final and conclusive on the court, if not absolutely binding on the Supreme Court of Missouri, is persuasive authority of the highest character. [Per DAVID E. BLAIR, J., dissenting.] *Ib.*
 20. ———: ———: ———: **Weight of Authority: On Principle.** The decided weight of authority is to the effect that the existence of the necessity for a legislative act is a matter of legislative determination. But independent of decided cases, and on principle, the courts are and should be bound by the declaration in an act passed by the Legislature that its enactment is necessary for the immediate preservation of the public peace, health and safety. [Per DAVID E. BLAIR, J., dissenting.] *Ib.*

LICENSE. See **Dentists.**

LIMITATIONS.

1. **Equitable Partition: Improvements Made by Cotenant.** An allowance to one tenant in common of the value of improvements made by him upon land brought into equitable partition is to be based upon the conditional and reciprocal right of the other cotenants, is not recognized at law at all but only in equity, and is governed wholly by equitable considerations, among them the maxim that he who seeks equity must do equity. The cotenant out of possession, who has received no benefit of the common estate, is entitled to offset or credit the rental value of his interest against the allowance for improvements made and taxes paid by the cotenant in possession, especially where the latter has received the rents and profits to the exclusion of his cotenants; and neither the claim for improvements nor the claim for rent is barred by the Statute of Limitations, nor does the question of limitations enter into the adjustment. *Byrne v. Byrne*, 109.
2. ———: ———: **Excess of Rents.** Rents barred by the statute in an ejectment suit can only be used as a shield and not as a sword in chancery partition; only an equal amount of rental value can be allowed a co-tenant out of possession against an allowance for improvements made by a cotenant in possession, and not the excess of rents over the value of the improvements. *Ib.*
3. **Life Estate: Trustees Ex Maleficio.** Remaindermen cannot come into court and recover possession of land before the termination of the life estate, and no statute of limitations, that for thirty years or any other, begins to run against them until the life estate is determined by the death of the life tenant. And where the purchaser from the life tenant is a grantee with notice and a trustee *ex maleficio*, the statute does not run in his favor. *Mathews v. O'Donnell*, 235.
4. **Note: Indorsements: Other Necessary Proof.** There is no presumption that the indorsement of a partial payment on a promissory note was made at the time it bears date; on the contrary, to remove the bar of limitations it is necessary to adduce other proof than the mere production of the note with a credit thereon bearing a date which would have that effect—proof showing that the credit was actually made by the owner of the note, or by his direction at a time when the note was not barred, or, by direct evidence, that the payment was actually made by the maker at such time. *Lawson v. Meffert*, 337.
5. ———: ———: ———: **Similarity of Handwriting.** A judgment against a deceased maker's administrator on one note for \$2950 on which a credit of \$50 bearing date twenty days before the note would otherwise have been barred by limitations, and on another for \$500 on which a credit of ten dollars bearing date twenty-three days before the note would otherwise have been barred, cannot stand where the only proof, aside from the mere production of the notes themselves, that the payments were made when dated or at any other time, was opinion evidence that there was a similarity in the handwriting of the indorsements and that of the purported maker. If there is no evidence *aliunde* when a credit is indorsed, there must be proof that the payment was, in fact, made. *Ib.*
6. **Railroad Corporation: Issuance of Bonds: Delayed by Failure to Earn Interest: Power of Public Service Commission: Mandamus.**

LIMITATIONS—Continued.

Section 57 of the Public Service Act forbids the Public Service Commission from granting authority to a railroad corporation to issue bonds to cover expenditures that have been incurred more than "five years next prior to the filing of an application with the Commission for the required authorization." Relator had executed a mortgage upon all its existing and after-acquired properties, which contained a provision that it could thereafter issue bonds, to the extent of eighty per cent of its subsequently acquired properties, extensions and betterments, upon a showing that its net earnings for the previous twelve months were equal to twice the interest on its existing indebtedness. The extensions and betterments had been made more than five years before it applied to the Commission for authority to issue bonds to the extent of eighty per cent of their value, but the application had been delayed because the earnings had not equalled twice the annual interest charges until a short time before the application was made, and the application was denied because it was not made within five years after the expenditures were incurred, and the company brings mandamus to compel the Commission to grant the authorization. *Held*, that the five-year limitation in the statute was an impairment of the company's contract right to issue the bonds, and for that reason unconstitutional and void, unless it can be sustained on the ground that it is a reasonable police regulation, and it can be sustained on that ground only when it is shown to be in the interest, protection and promotion of the public good; and the facts do not make it apparent that the public good will in any wise be promoted by withholding from the company authority to issue the bonds, and the Commission is commanded to approve their authorization.

Held, by DAVID E. BLAIR, J., dissenting, that, the statute being void, the Supreme Court has no authority, by mandamus or otherwise, to compel the Public Service Commission to approve the authorization nor could the Commission prohibit the company from issuing the bonds; the statute having been declared void in its application to the company, the Commission has no jurisdiction to further consider the subject. *State ex rel. Ry. Co. v. Pub. Serv. Comm.*, 452.

7. **Dower: Homestead: Remarriage of Widow: Duration as to Minors.** The right of the widow to dower being assignable, and her homestead right being extinguished by her re-marriage, and the right to have dower assigned reviving upon the extinguishment of her homestead right, and the homestead estate of the minor children being limited to the joint right of occupancy with the widow, they are in possession after her re-marriage by right of inheritance from their father and not under the Homestead Act, and it is upon the date of her re-marriage that the right accrues to her or her assignee to have her dower admeasured and assigned, and the grantee in her deed, made after her husband's death and before her re-marriage, must bring his suit to have assigned and to recover her dower within ten years after her re-marriage, under the statute (Sec. 391, R. S. 1909) which declares that "all actions for the recovery of dower in real estate, which shall not be commenced within ten years after the death of the husband, through or under whom such dower is claimed or demanded, shall be forever barred." *Smith Bros. Land Co. v. Phillips*, 579.

LIMITATIONS—Continued.

8. ———: **Assignment of Dower.** Where the homestead is all the real estate of which the husband died seized and does not exceed the statutory value or quantity, it is unnecessary to appoint commissioners to assign dower to his widow; but her deed conveys her dower and her re-marriage extinguishes her homestead right, and the right of her grantee to have her dower admeasured to him accrues on the date of her re-marriage, and becomes extinct in ten years thereafter. *Ib.*
9. ———: ———: **Quarantine.** The widow's quarantine, which is her right to remain in and enjoy the mansion house and the messuages and plantation thereto belonging, is an incident to the right to have dower assigned, and when that right ceases quarantine also ceases, and where her grantee is barred by limitations to recover her dower he is also barred to recover any supposed quarantine right. *Ib.*
10. **Dower: Homestead: Re-marriage.** Where the widow conveyed her interest in the homestead property and then married again, her right to dower accrued on her re-marriage, and the right of her grantee to maintain suit to have assigned and to recover dower is barred in ten years after re-marriage, and said grantee being barred her right to have her deed cancelled as fraudulent and to have dower assigned to her is likewise barred in ten years. *Smith Bros. Land Co. v. Phillips, 595.*

LIS PENDENS. See **Execution.**

MANDAMUS.

1. **Payment of Salary.** Mandamus is an appropriate remedy to compel a public official, whose duty it is to pay another official his salary, to pay such salary, where its amount is fixed by law; for then no discretion is left as to the amount, and where the only question is, what is the amount the law fixes as the salary, it is purely a legal one. *State ex rel. Koehler v. Bulger, 441.*
2. **Motion to Strike Out Parts of Return: Judgment on Pleadings: Irrelevant Matter.** In mandamus, where relator has filed a motion to strike out a portion of the return, which is taken with the case, the court, having overruled the motion, will proceed to consider the case upon a motion for judgment on the pleadings, but disregarding all irrelevant matter, whether it appears in the petition or return. *State ex rel. Wolfe v. Dental Board, 520.*
3. ———: **Stare Decisis.** A mandamus suit brought in the Supreme Court to compel the Missouri Dental Board to issue a license to relator is not a second appeal, but a new case. But even on second appeal, after the case has been tried on the basis of the ruling on the first appeal, the court reserves the right to correct its former ruling. What was said in the former suit of *State ex rel. Wolfe v. Missouri Dental Board, 282 Mo. l. c. 303*, to the effect that the board had a discretion to withhold an annual license to a registered dentist was an inadvertence, and related to the issuance of the certificate of registration, or to a trial for the revocation of the certificate and the license, and in so far as it may be understood as a holding that the board is invested with a discretion to withhold a license to a registered dentist should be corrected, and is corrected upon a full review of the whole statute.

MANDAMUS—Continued.

Held, by JAMES T. BLAIR, C. J., dissenting, with whom DAVID E. BLAIR, J., concurs, that the decision in the former case of *State ex rel. Wolfe v. Missouri Dental Board*, 282 Mo. 292, is well supported by Section 12636, Revised Statutes 1919, and is sound law. *State ex rel. Wolfe v. Dental Board*, 520.

MARRIAGE.

1. **Common-Law: Sufficient Proof.** A valid marriage may be entered into between parties willing and competent to contract at common law, without solemnization by minister or officer. Testimony that a man and woman in February, 1910, at Salina, Kansas, entered into a present agreement to become man and wife; that in a few days they returned to the home of her mother in Missouri, and introduced themselves as man and wife and received the mother's blessing; that he provided an elegant home where she and he resided happily together until March, 1917; that during all that time they treated each other as man and wife, were introduced as man and wife, and were so regarded among their friends and neighbors, is amply sufficient, without a ceremonial marriage, to establish a common-law marriage. *Hollinghausen v. Ade*, 362.
2. ———: **Sister's Privilege: Counsel and Advice.** There is no initial presumption of good faith on the part of a sister who interferes in the marital relations of her brother and plaintiff. The law does not presume that advice and counsel given by a sister to her brother to separate from his wife is given in good faith. She does not possess the superior right of a parent. *Ib.*

MARRIED WOMEN.

1. **Conveyance: Acknowledgment of Married Woman: Statute of 1855.** Where the statute (R. S. 1855, ch. 32, sec. 39, p. 363) required that the certificate of acknowledgment of a married woman shall set forth "that she executed the same freely and without compulsion or undue influence of her husband," a certificate reciting that the married woman "executed and delivered the said deed freely and without compulsion of their said respective husbands" is sufficient, without using the words "undue influence." The statute requires no more than a substantial compliance with its terms, and is satisfied if the free and unconstrained consent of the wife to the deed is obtained. *Mathews v. O'Donnell*, 235.
2. ———: **Married Woman's Deed: After-Acquired Interest.** Under the statute of 1855 (R. S. 1855, sec. 36, ch. 32, p. 363) the deed of a married woman who owned only a life interest in land did not pass her interests subsequently inherited from the remaindermen. Prior to the Married Woman's Act of 1889, only whatever interest a married woman had at the time was conveyed by her deed, whatever its form. *Ib.*

See, also, **Alienation.**

MISTAKE.

1. **Will Contest: Legal Advice as to Husband's Curtesy.** Testatrix gave written directions for the contents of her will, and after it was written and submitted to her, she caused it to be re-written in order to correct a minor error. Being re-written and submitted to her, she read it and said it contained the exact pro-

MISTAKE—Continued.

visions she desired to be incorporated in it, and it was then signed and witnessed, and there is no real contention that she did not know its contents. There was no mental, physical or educational impediment to her understanding it, and there was no evidence of fraud, coercion or undue influence. Giving the fee in remainder to two children, it devised to her husband a life estate in her real estate, in lieu of all his "other rights, interests or claims" in her estate, and provided that out of the income of the property he should use \$150 a year, until \$1000 should be so used, to purchase a home for another child, the contestant. The draftsman testified that the matter of the husband's rights were discussed, and that he advised her that a surviving husband was entitled to a life estate in one-half of his wife's property. *Held*, first, there being no evidence to show how she held the property devised and it being the law that property may be so conveyed that the husband's curtesy is excluded and the wife's estate one of which she can dispose by will, the instrument cannot be held not to be her will on the ground that her husband was entitled by the curtesy to a life estate in her lands, and that the attempt to impose a charge upon it in favor of contestant was therefore unavailing, and testatrix received and acted upon unsound advice concerning her husband's marital rights in her lands, for in order to so hold it would be necessary to assume that her title was so taken that his curtesy was not excluded; and, second, even though the assumption were permissible, the mistake was not such as would authorize a setting aside of the will. *Elam v. Phariss*, 209.

2. **As to Legal Effect of Provisions.** A mistake of law in the mind of the testator, who is of sound mind and free from undue influence, or a mistake as to the legal effect of provisions contained in the will, will not invalidate the will. Where testatrix was advised by an attorney that her surviving husband would have a curtesy equal to a life estate in one-half of her property, and, in lieu of all his "other rights, interests and claims," she devised to him a life estate charged with the obligation that he should pay to one of her daughters one thousand dollars, such advice, even though erroneous, and such provision in the will, even though she may not have understood its legal import, are not sufficient for refusing probate to her will. *Ib.*
3. **Deed: Lease: Mutual Mistakes: Reformation.** Where the agreement between a mother and her son was that her farm should be leased to the son for ten years at a named annual rental, and in addition he was to pay the taxes and make needed improvements on the dilapidated farm and pay the interest on two existing mortgages and advance her whatever sum above the rental was necessary for her comfort, and he was to be reimbursed for all said outlay above the annual rental by an extension of said lease at the same rental for such a time as would reimburse him, and that a deed should be made to all her children as equal grantees, subject to said lease, and said agreements were not incorporated in either of said cotemporaneous instruments, and the son, in his answer to the mother's suit to have the deed and lease cancelled, asserts that such were the agreements and prays that the instruments be reformed to include them, the court should reform the deed so to make it subject to the lease and the mother's life estate, and reform the lease so as to extend it for such period as will meet the other terms of the agreement. *Smith v. Smith*, 405.

MORTGAGES AND DEEDS OF TRUST.

1. **Suit to Foreclose: Trustee as Party.** To a suit brought against the guardian and curator to foreclose a deed of trust executed by an insane person, the trustee is not a necessary party, and a failure to make him a party in no manner affects the validity of the sale. *Sidwell v. Kaster*, 174.
2. ———: **Wife as Party: Waiver.** If the divorced wife of the insane mortgagor was a necessary party to a proceeding brought against his guardian and curator to foreclose a deed of trust, the defendant should by answer or demurrer have raised the point that she was a necessary party, and having failed to do so waived the defect. *Ib.*
3. **Foreclosure Sale: Conspiracy Not to Bid: Inadequacy of Price.** In a suit to quiet title, brought by the purchaser at a sheriff's sale of land worth \$100 to \$125 per acre, and another who had purchased after the sale and paid a part of the purchase price, against the mortgagor who claims the foreclosure proceeding was void, it will not be held that there was a conspiracy between the purchaser at the sheriff's sale and the person to whom he subsequently sold that the buyer would not bid at said sale, there being no evidence that he would have bid or intended to bid had there been no agreement to buy, and there being evidence that he could not get a clear title because of the outstanding dower of the judgment debtor's wife, who by his fault had not been impleaded with him in the foreclosure proceeding. Nor under such circumstances will it be held that the price of \$68.75 per acre paid at the sheriff's sale was inadequate, the wife's dower not being included. *Ib.*
4. **Action On Insurance Policy: Brought By Trustee and Mortgagee: Bringing in Mortgagor.** In an action at law on a fire insurance policy brought by the trustee and mortgagee for the amount of the insurance upon the mortgaged property, it is not proper to require the mortgagor or his grantee to appear and plead to plaintiff's cause of action, since they are not only unnecessary parties, but have no interest in the controversy between the plaintiffs and the defendant insurance company. *State ex rel. Ins. Co. v. Reynolds*, 382.
5. **Railroad Corporation: Issuance of Bonds: Property Right.** The provision of a railroad company's mortgage, covering all present and subsequently acquired properties, that, upon making future extensions and improvements, it could issue other bonds equal to eighty per cent of the value thereof, upon a showing that its net earnings for twelve months had been equal to twice the interest on its existing indebtedness, is a property right, and cannot be destroyed by any unreasonable subsequent legislation in the nature of a police regulation. *State ex rel. Ry. Co. v. Pub. Serv. Comm.*, 452.
6. ———: ———: **Delayed by Failure to Earn Interest: Power of Public Service Commission: Mandamus.** Section 57 of the Public Service Act forbids the Public Service Commission from granting authority to a railroad corporation to issue bonds to cover expenditures that have been incurred more than "five years next prior to the filing of an application with the Commission for the required authorization." Relator had executed a mortgage upon all its existing and after-acquired properties, which contained a provision that it could thereafter issue bonds to the extent of eighty

MORTGAGE AND DEEDS OF TRUST.—Continued.

per cent of its subsequently acquired properties, extensions and betterments, upon a showing that its net earnings*for the previous twelve months were equal to twice the interest on its existing indebtedness. The extensions and betterments had been made more than five years before it applied to the Commission for authority to issue bonds to the extent of eighty per cent of their value, but the application had been delayed because the earnings had not equalled twice the annual interest charges until a short time before the application was made, and the application was denied because it was not made within five years after the expenditures were incurred, and the company brings mandamus to compel the Commission to grant the authorization. *Held*, that the five-year limitation in the statute was an impairment of the company's contract right to issue the bonds, and for that reason unconstitutional and void, unless it can be sustained on the ground that it is a reasonable police regulation, and it can be sustained on that ground only when it is shown to be in the interest, protection and promotion of the public good; and the facts do not make it apparent that the public good will in any wise be promoted by withholding from the company authority to issue the bonds, and the Commission is commanded to approve their authorization.

Held, by DAVID E. BLAIR, J., dissenting, that, the statute being void, the Supreme Court has no authority, by mandamus or otherwise, to compel the Public Service Commission to approve the authorization nor could the Commission prohibit the company from issuing the bonds; the statute having been declared void in its application to the company, the Commission has no jurisdiction to further consider the subject. *Ib*.

NEGLIGENCE.

1. **Instruction: Presumption of Fact: Contributory Negligence.** It is improper, ordinarily, to instruct a jury with reference to presumptions of fact as they relate to questions submitted for their determination after hearing the evidence. In a suit for damages for the negligent killing of a pedestrian by an automobile in the night time, an instruction telling the jury that "you are further instructed that the burden of proving contributory negligence on the part of the deceased is upon defendant; the presumption is that the defendant was in the exercise of ordinary care for his own safety at the time of his death, and this presumption continues until overthrown by a preponderance or greater weight of the evidence," is erroneous, if there was any substantial evidence whatever of contributory negligence on the part of deceased, sufficient to take the question to the jury. *McKenna v. Lynch*, 16.
2. **Automobile and Pedestrian: Relative Rights to Street: Duties to Each Other.** A pedestrian, equally with the operator of an automobile, has the right to be upon and use the traveled part of a public street instead of the sidewalk, and it is not as a matter of law the duty of a pedestrian, while walking along the traveled part of a highway, to turn about constantly and repeatedly to observe the possible approach of vehicles from the rear. On the contrary, such a pedestrian may assume that the operator of the automobile will exercise ordinary care in keeping a lookout; that under ordinary conditions he will be discovered by such operator; and that the operator, as he approaches, will slow down and give an audible signal with his horn; but he is also required to be on the lookout

NEGLIGENCE—Continued.

for automobiles, and to exercise ordinary care for his own protection, according to the circumstances of the situation in which he finds himself. *McKenna v. Lynch*, 16.

3. **Instruction: Contributory Negligence: None as Matter of Law.** It cannot be said as a matter of law that at the time deceased was struck by an automobile on a traveled portion of a street not customarily used by pedestrians he was in the exercise of ordinary care for his own safety, where the time was a dark night, and there was evidence that he walked straight ahead without turning his face to the right or left, and that the advancing rays of the headlight shot past him while it was a hundred yards away. *Ib.*
4. **Using Crippled Locomotive Engine: Escaping Steam.** The evidence showed that the engineer was the superior officer of the fireman; that it was the general railroad practice that when an engine became crippled not to proceed with the train until another was obtained from the nearest terminal shop; that after the train was under way on a regular run, it was discovered that steam in large quantities was escaping from the front end of the low-pressure cylinder on the left (or fireman's) side; that this steam enveloped the cab, and the working place of the fireman between the cab and coal tender; that after the train had run about twenty miles and had stopped at a principal town, the engineer notified the dispatcher that the engine was crippled, but it does not appear that anything further was done towards getting another engine, although at a station thirteen miles away the company maintained terminal shops and a round-house for engines; that it was dangerous to passengers to operate such an engine, and dangerous to the engineer and fireman because escaping steam would prevent them from seeing ahead; and that the train proceeded on schedule time, and the fireman's clothes were thoroughly wet by the escaping steam. *Held*, that these facts tended to show negligence on the part of the defendant; and testimony on the part of the engineer that the engine could be safely run, that the steam did not wet him and that the fireman did not complain of being wet when they took off their working clothes at the end of the run, is of no value in a consideration of a demurrer to the evidence. *Kilburn v. Ry. Co.*, 75.
5. ———: ———: **Proximate Cause of Pneumonia.** Evidence that the clothing of the fireman of a train was thoroughly wet on November 28th by the steam escaping from the engine; that he removed his overalls in the cab at the end of the run, put on dry outward clothing and went home, and his underwear was then so wet that by twisting it water ran out; that he began coughing on the 28th, and a deep-seated cold followed just after that date until the full development of pneumonia on December 6th, and that on December 13th he died from lobar pneumonia, and testimony of physicians that pneumonia often develops eight or ten days after exposure, where there are prodromal symptoms, and their testimony connecting the exposure to the steam with the pneumonia which caused his death, is evidence from which the jury could find that the superinducing and proximate cause of the pneumonia and his subsequent death therefrom was the negligence of the railroad company in failing to provide a safe engine. *Ib.*

NEGLIGENCE—Continued.

6. **Patent Defect: Crippled Engine.** Whether steam escaping from a running engine and enveloping the cab was so patently dangerous to the fireman, obeying the directions of his superior, the engineer, that a reasonably prudent man would not undertake to work thereon, is a question for the jury, and not a matter of law for the court to determine. *Ib.*
7. ———: **Assumption of Risk.** Where steam was escaping from a running engine and enveloping the cab, and the evidence conflicts as to the duties of the fireman, and the engineer testifies that the engine could have been safely operated, the fireman will not be held, as a matter of law, to have assumed the risk of further operation, after the danger was discovered, but assumption of risk, under such circumstances, is, at most, a question for the jury. *Ib.*
8. **Federal Employers' Liability Act: Invoking Safety Appliance Act: Contributory Negligence.** A plaintiff who, by her petition, plants her action, for the recovery of damages for the killing of her husband while engaged in interstate commerce, upon the Federal Employers' Liability Act, is not precluded from the benefit of the several safety statutes, if they are called into play by the facts. Said act by express reference makes the safety statutes applicable under stated circumstances by providing that "no employee who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee;" and the Boiler Inspection Act is especially applicable where plaintiff's husband was a fireman and was injured by steam which escaped from the defective engine and enveloped the cab in which he was at work, for Section 2 thereof is made to "apply to and include the entire locomotive and tender and all parts and appurtenances thereof," and under such circumstances contributory negligence is not even a partial defense. *Ib.*
9. ———: ———: **Assumption of Risks: Contributory Negligence: Instructions.** Section 2 of the Boiler Inspection Act made it "unlawful for any common carrier, its officers or agents," to use a locomotive in interstate commerce, unless such engine and all parts thereof were in proper condition and safe to operate in the service to which put, without unnecessary peril to life or limb, and this section is by express reference made applicable to an action based on the Federal Employers' Liability Act; and where the facts show that the piston rod on the left low-pressure cylinder of the locomotive engine was broken off and the front end of the left cylinder had burst, and from said opening steam escaped when the train was running fast, and enveloped the cab in which plaintiff's husband as fireman was at work, and that the use of said engine was negligently continued in the operation of the train after its defective condition became known to the engineer, who was the fireman's superior, and such defective condition and negligent act were the proximate cause of the fireman's death, the instructions to the jury, in an action by the fireman's widow, planted on the Federal Employers' Liability Act, should eliminate the defense of contributory negligence and assumption of risks. *Ib.*

NEGLIGENCE—Continued.

10. **Measure of Damages: Diminution by Contributory Negligence.** And where, under the Boiler Inspection Act and the facts, contributory negligence is eliminated from a case brought under the Federal Employers' Liability Act, an instruction on the measure of damages which excludes any diminution of damages on account of the alleged contributory negligence of the deceased fireman, is not erroneous. *Kilburn v. Ry. Co.*, 75.
11. —: **Conscious Physical Sufferings.** Since the amendment of 1910 to the Federal Employers' Liability Act, the plaintiff may recover for the conscious bodily sufferings of the deceased fireman after his exposure to danger and before his death. *Ib.*
12. **Argument To Jury.** Where counsel for plaintiff in their argument to the jury went outside the record and made unduly inflammatory remarks, but the trial court, upon objection, directed the jury not to consider them, and the size of the verdict indicates that they were not influenced thereby, the judgment will not be reversed. *Ib.*
13. —: **Reading From Medical Book.** Counsel for plaintiff, in cross-examining physicians offered as witnesses by defendant, used several medical books, and got one of the physicians to admit that a certain passage in one of them was correct doctrine and to say that he would adopt it as an expression of his own views, and this passage counsel for plaintiff, in his argument, was reading to the jury when the trial judge stopped him and told him he had no right to read from the book, as it had not been offered in evidence. *Held*, that the conduct of counsel was not reversible error. *Ib.*
14. **Instruction: Inclusion of Specific Allegation.** Where the petition alleges that the conductor of a street car, which had stopped at an elevated station to take on passengers, caused said car to start forward, "and before plaintiff was able to get into the vestibule of said car or on the platform of said car, and while yet standing on the steps of said car with one foot, the conductor closed the door of said car while same was moving, pushed plaintiff off the step and, as a result thereof, plaintiff was thrown violently from said car to the street below," an instruction requiring the jury to find that the "conductor negligently caused said car to start forward and negligently closed the door of said car while said car was moving, and as a direct result thereof the plaintiff was thrown from said car to the street below and injured" omits no specific allegation. In requiring the jury to find that plaintiff was "thrown from" the car it used words of like significance as the allegation "pushed plaintiff off said car." *Pietzuk v. K. C. Rys. Co.*, 135.
15. **Physical Impossibility: Peremptory Instruction.** The evidence in this case does not show that it was a physical impossibility for the plaintiff to have been injured in the manner claimed by him and his witnesses, and therefore the trial court did not err in refusing to give to the jury a peremptory instruction to find for defendant. *Ib.*
16. **Argument To Jury: Character of Defendant: Withdrawal.** In his closing argument to the jury plaintiff's counsel said that no jury would live long enough to sit on a case against the defendant company in which that company would not come in without a

NEGLIGENCE—Continued.

defense of some kind. Defendant's counsel objected that the remark was outside of the record, wholly incompetent and prejudicial, and asked that plaintiff's counsel be reprimanded. The court directed counsel to proceed, to which action defendant's counsel excepted. Thereupon plaintiff's counsel withdrew the remark, and substituted another to the effect that the defendant company could not be expected to come into court and admit liability, to which no objection was made. *Held*, that the trial court was in a better position to determine the propriety and effect of the first statement made by plaintiff's counsel than is the appellate court: that the fragmentary part of the counsel's speech was not sufficient to have influenced the jury in arriving at their verdict: and that if there was any transgression of proper argument it was cured by its withdrawal. *Ib.*

17. **Verdict: Contrary to Greater Weight.** Where the record is devoid of anything which could give rise to a logical conclusion that the jury were prejudiced, or corrupt, or grossly negligent, or that they disregarded the instructions of the court, their verdict cannot on appeal be set aside as contrary to the greater weight of the evidence, although only three witnesses testified to the same facts showing defendant was guilty of the negligence charged, and six for defendant testified to the contrary, only one of whom identified plaintiff as the man who was injured. *Ib.*
18. **Excessive Verdict: \$15,000.** Plaintiff, in attempting to board a street car from an elevated platform, was thrown to the street, thirty feet below. He sustained a broken jaw, a broken chest, his legs were hurt, and five or six teeth were knocked out; there was a fracture at the base of the skull, which produces a dizziness in the head, and makes it dangerous for him to work about machinery or upon a scaffold; the bones of the jaw are not in perfect apposition, the teeth being out of line; there is an irritability in the spinal cord, and his symptoms are nervous dizziness and occasional headaches; his physician's bill was \$185, and he was earning \$572 a year prior to the accident, was then thirty-three years of age, and two years and a half afterwards went to work again, and his chances of complete recovery and of permanent impairment are about equal. *Held*, that a verdict for \$15,000 is excessive by \$4,000. *Ib.*
19. **Injury to Interstate Passenger: Free Pass: Stipulated Exemption.** The United States courts, in the trial in them of causes governed solely by the common law, follow their understanding of the common law, regardless of the decisions of the courts of the state in which the cause of action arose; and they have uniformly held that under the common law, irrespective of any act of Congress regulating interstate commerce, stipulations in an interstate free pass exempting a carrier from liability for personal injury to the passenger negligently inflicted, are enforceable. But under the law of this State an attempt by a common carrier, by a stipulation annexed to a free pass, to relieve itself of the consequences of its negligence, is ineffective; and where the passenger was riding on a free pass containing such a stipulation, in an interstate journey, her case, if instituted in this State, is to be determined according to the applicable local state law, unless that law has been superseded by some act of Congress regulating interstate commerce, and it has not been so superseded. *Van Zant v. Ry. Co.*, 164.

NEGLIGENCE—Continued.

20. **Injury to Interstate Passenger: Free Pass: Stipulated Exemption: Hepburn Act: Anti-Pass Regulation: Member of Family.** The Hepburn Act, fixing a penalty against a common carrier which issues an interstate free pass, "except to employees and their families," and a like penalty against any person who uses such pass, did not attempt to cover the field of damages for personal injuries negligently inflicted by the carrier upon a person riding on said pass, but the sole purpose of that part of the act was to prohibit the issuance of free transportation by interstate carriers. It did not prohibit the issuance of an interstate free pass obtained by a railroad employee for his mother, a member of his family, nor prevent her from recovering damages for personal injuries received by her, in this State, while riding, in an interstate journey, on said pass. *Van Zant v. Ry. Co.*, 164.
21. ———: ———: ———: ———: **Carmack Amendment.** Neither the Hepburn Act nor the Carmack Amendment thereto superseded the law of this State that a stipulation attached to an interstate free pass will not relieve the carrier from damages for personal injuries, negligently inflicted in this State, upon the person using such free pass, in a suit brought in the courts of this State. The Carmack Amendment dealt with the carriage of property only. *Ib.*
22. **Injury in Kansas: No Pleading of Statutes.** In an action for damages for personal injuries negligently inflicted in Kansas, in which plaintiff pleads no statute or ordinance but does state a cause of action under the general law of negligence, and wherein defendant invoked no statute or other law of Kansas, the law of Missouri applies, and the case is properly tried under Missouri rules of negligence. *Hill v. K. C. Rys. Co.*, 193.
23. **Pedestrian on Track: Humanitarian Rule.** A girl five years of age went with her brother to a fountain near the intersection of streets and after getting water they started to retrace their steps northward across railway tracks, and upon reaching the tracks upon which east-bound cars ran the little girl dropped a penny and was looking for it at the time an east-bound car approached, and the brother, having reached the track on which west-bound cars ran and hearing an exclamation from his sister, turned and saw her looking for the penny and shouted to her, but she became confused and did not get off the track; and there was evidence, that the car was then fifty feet away, that it could have been stopped in much less than fifty feet, that the view was clear for at least seventy-five feet, that the motorman was talking to some one and not looking ahead, and that no gong was sounded or other warning given. *Held*, that the evidence was sufficient to take the case to the jury under the humanitarian rule, and being so submitted it became their province to determine the credibility of the witness who testified to the foregoing facts. *Ib.*
24. **Humanitarian Rule: Concurrent Acts: Pleading and Instruction.** The facts constituting negligence under the humanitarian rule may be pleaded with other negligent acts in the same count of the petition, and recovery be had upon the negligence covered by the humanitarian rule, and the instruction may omit all other acts of negligence. Plaintiff is not required to prove all acts of negligence pleaded, if those proven authorize a recovery under the humanitarian rule and the instruction properly submits them. *Ib.*

NEGLIGENCE—Continued.

25. **Pedestrian on Track: Oblivious to Peril.** Under the humanitarian rule, if the operator of a street car sees a person in peril, and oblivious thereto, he is required to use any and all means at hand to avert injury to such person. If he can stop the car, he must stop; if unable to stop, and a slackening of the speed will avert the injury, he must slacken it; if a warning will avert the injury, ordinary care requires him to give warning. *Ib.*
26. **Mental Anguish: Physical Deformity.** Where the little girl's left arm was cut off just below the elbow, her left foot was off back to the heel, the big toe and the one next to it of the right foot were off, and the third toe was broken and bent out and under the foot in a hook shape, there was sufficient evidence for an instruction telling the jury to allow her damages for any mental anguish she had suffered or would hereafter suffer; for these injuries were permanent, and mental anguish may be the outgrowth of them as the years come and go. *Ib.*
27. **Legal Age: Subsequent Wages: Law of Forum.** Where the little girl was injured in Kansas and sues for common-law damages in Missouri, the law of the forum governs, and therefore an instruction authorizing the jury to allow her to recover for impaired ability to earn money "after she becomes of legal age," without proving what is the legal age in Kansas, is not erroneous. *Ib.*
28. **Pleading: Departure: Cause Under Kansas Statutes.** A petition which states the ultimate fact of a cause of action for negligent personal injuries under Sections 4218 and 4219, Revised Statutes of Missouri of 1919, also states a cause of action under Sections 7323, 7324 and 11829 of the Kansas statutes; and where the petition states a cause of action under these Missouri statutes, an amended petition in which these Kansas statutes are pleaded for the purpose of showing that under them plaintiff had a right to sue, and that they create a cause of action for negligence committed in Kansas, is not a departure. The ultimate fact of negligence being alleged in both petitions, the character of proof required, the measure of damages and the judgment to be rendered upon a finding for plaintiff are the same. *Montague v. Ry. Co.*, 288.
29. —: **Explanatory Amendments.** A petition which states a cause of action, but states it imperfectly, may be amended so as to cure the defect. The addition by way of an amended petition of allegations which maintain, explain, fortify and strengthen the cause of action stated in the original petition, does not constitute a departure. Whether a change from law to law is a change of the cause of action depends on whether the facts essential to constitute a cause of action are the same or different in the two pleadings, rather than whether the pleader intended the one law or the other to apply. Where the original petition states the facts essential to a cause of action for damages based on unpleaded Missouri statutes, for negligent personal injuries inflicted in Kansas, an amended petition, containing the same essential allegations, to which are added others showing plaintiff's right to sue and that the same facts constitute negligence under the statutes of Kansas, • which are for the first time pleaded as an amendment, is not a departure. *Ib.*

NEGLIGENCE—Continued.

30. **Pleading: Amendments Liberally Allowed.** Under the Missouri statute (Sec. 1274, R. S. 1919), amplifying and liberalizing the right to amend pleadings, and limiting the right only by the sound judicial discretion of the court applicable to the facts of each particular case, the proper rule is to allow amendments and the exception to refuse them, and not to refuse them unless the opposite party will be injured by the amendment; and where the amended petition does not require a different character of evidence from that necessary to support the original petition, the measure of damages and the identity of the subject-matter are the same in both, and a judgment rendered upon either will constitute a complete bar an action on the other, the amendment should be allowed, and not held to be a departure. *Montague v. Ry. Co.*, 288.
31. ———: **Amendment Required by Answer.** Where an amended petition is made necessary by an issue tendered in defendant's answer, filed by leave of court upon the eve of the trial, defendant is in no position to complain of an amendment which controverts or avoids the new matter set up by way of defense. *Ib.*
32. **Certiorari: To Court of Appeals: Evidentiary Facts.** In *certiorari* to a court of appeals based on conflict with prior decisions, the Supreme Court takes the evidentiary facts stated in the opinion of the Court of Appeals as the facts of the case. Where it is stated in said opinion that "there was evidence tending to show that the speed of the train was not slackened until after deceased was struck" the Supreme Court will assume that said statement is true, although an examination of the testimony might weaken the conclusions of law reached by that court. *State ex rel. Frisco Railroad v. Reynolds*, 479.
33. **Crossing Railroad: Danger Zone: Humanitarian Rule.** The railroad ran east and west, and for about a half mile west of the station the double tracks were straight; north of them was the station house or waiting room, and south of them was a platform where passengers boarded east-bound trains; deceased, two other ladies and two children were in the station awaiting the arrival of a local train due to stop at 9:45 a. m., but late; at about ten o'clock a through-passenger train, not scheduled to stop at the station and running several hours late and at the rate of forty-five miles per hour, approached from the west, and hearing its whistle these five persons, supposing it to be the local train, left the station and started across the tracks for the platform, and two of the women and the two children got across, but deceased, who was just behind the others, was struck just as she stepped off the south rail of the south track; a second or two more and she would have reached a place of safety. When the train was 1320 feet west of the station, the engineer saw this group of five persons leave the station and start across the tracks, and realizing they were attempting to cross he gave the brakes a "service application," which is the ordinary method of stopping a train as distinguished from an "emergency application," which slows up and stops it more quickly and which, if it had been given, would have stopped the train within the 1320 feet. The acts of the parties indicated to the engineer, that they knew the train was approaching, which carried with it knowledge of the fact that it was approaching very rapidly. *Held*, that the engineer had a right to assume that deceased would stop before entering upon the south track, and the

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five persons were not passengers from the time they left the station, but, as to this non-stopping through train, the danger zone began, not at the doors of the station, but, practically, with the south track; and, the Court of Appeals, in ruling that the five persons were passengers from the moment they left the station for the purpose of boarding what they supposed was the local train and that it was the duty of the engineer from that moment to do everything he reasonably could have done to stop or slacken the speed so as to prevent the accident, contravened *Boyd v. Railway Company*, 105 Mo. 371, and later cases, and its opinion is therefore quashed. The deceased was guilty of contributory negligence, and there was nothing in the facts which brings it within the range of the humanitarian rule.

Held, by WALKER, J., dissenting, that the facts of the case of *Boyd v. Railway Company*, 105 Mo. 371, are different from those in the instant case, and that the ruling of the Court of Appeals does not contravene the decision in that case, and hence the writ of *certiorari* herein should be quashed. *Ib.*

34. **Tort: Railroad Train: Unlawful Speed: Wilful, Wanton and Reckless Injury.** The mere act of trainmen in moving a railroad train at a speed of forty or forty-five miles an hour across a much used public street in a densely settled portion of a city where people are likely to use said crossing at any time, without ringing the bell or blowing the whistle, is not sufficient to authorize a submission to the jury of the question whether such act was wilful, wanton, reckless and in conscious disregard of the life and bodily safety of a traveler on such street, there being no showing that the engineer or fireman intentionally ran the train upon such traveler, or saw him approaching the track or in a position of danger or likely to be in such position, or within what distance the train could have been stopped if the traveler had been so seen. *Evans v. Illinois Cent. Ry. Co.*, 493.
35. ———: ———: ———: **Contributory.** The acts of the driver of an automobile, in attempting to cross a railroad track in broad daylight at a public crossing where he had reason to expect a train at any moment and where for a distance of fifteen feet from the track he had an unobstructed view of any train that might be approaching, without looking, and where, if he had looked, he could have seen the train which struck him for a distance of three to six hundred feet, constituted such contributory negligence as would bar a recovery by his widow in an action based on an allegation of negligence. And although the acts of the trainmen in approaching the public crossing at an excessive speed and without blowing the whistle or ringing the bell constituted negligence on the part of the railroad company, such negligence on the part of the traveler would constitute a complete defense to an action based on an allegation of negligence.
36. ———: ———: ———: **Wilful, Reckless and Wanton Injury: Definition.** Wilfulness implies intentional wrongdoing. A wanton act is a wrongful act done on purpose or in malicious disregard of the rights of others. Recklessness is an indifference to the rights of others and an indifference to whether wrong or injury is done to another. The words "conscious disregard of the life and bodily safety" of another add nothing to the words "wilful, wanton and reckless." *Ib.*

NEGLIGENCE—Continued.

37. **Tort: Railroad Train: Contributory Negligence as Defense: Intentional Injury.** Negligence of the injured party is no defense when such injury is intentionally inflicted. But the intention of the engineer to injure a traveler at a public street crossing in a densely crowded city cannot be inferred from the mere fact that the train was run at an excessive speed without ringing the bell or sounding the whistle. Such acts constitute negligence, but they do not alone justify the inference that they were wilfully, wantonly and recklessly done. *Evans v. Illinois Cent. Ry. Co.*, 493.
38. ———: **Contributory: Recovery for Wanton or Reckless Injury.** Where the acts of defendant constitute mere negligence, and the acts of the injured party constitute contributory negligence and a complete defense to an action for negligence, the case cannot be submitted to the jury on the theory that defendant's negligent acts constituted a wanton, wilful and reckless injury. Before a case can be submitted to the jury on the theory that defendant's acts were wanton, wilful and reckless, and therefore that the injury was intentionally inflicted, something more than acts which heretofore have been held to constitute mere negligence must be shown. But such rule does not prevent a showing in any case of acts which of themselves indicate an intentional or wanton injury, or affect the other rule that contributory negligence constitutes no defense to an action for injuries intentionally inflicted. *Ib.*
39. **Contributory: Railroad Crossing.** The driver of an automobile, traveling on a public street twelve miles an hour towards a railroad, who, had he looked at any time after he reached a point within fifty feet of the crossing, could have seen a train approached, but did not look, was guilty of contributory negligence. *Alexander v. Frisco Ry. Co.*, 599.
40. ———: ———: **Looking in Wrong Direction.** Near the railroad track were some bill boards and trees which obstructed a southward view of the railroad track of a traveler on an intersecting public street, until he had passed them and was within fifty feet of the track, and from there on there was nothing to prevent him seeing an approaching train, except the telegraph poles, which were about one hundred and seventy-five feet apart, which to a man traveling in an automobile, the traveler testified, would obstruct a view of a passenger train of six cars for a half mile; after passing the bill boards, which were eighty feet from the track, he did not look southward until his automobile, traveling twelve miles an hour, was within ten or fifteen feet of the track; when he was twenty-seven feet from it he could have seen a train coming from the south for a distance of a half mile, but he did not see or hear the train until he was within ten or fifteen feet of the track, which was then too close to stop his automobile before the long train, an hour behind schedule and running from twenty-five to thirty-five miles an hour, would have reached the crossing, and his only chance therefore was to go ahead, but in trying to cross he was struck and injured. The reason he did not look southward for an approaching train after passing the bill boards was that a gentleman riding with him called his attention to some one who was standing north of the street near the track and was hallooing to him, apparently, and this attracted his attention northward and before he ceased to look in that direction his automobile had run sixty-five or seventy feet, which brought him within twelve or fifteen feet

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of the track. He was intimately familiar with the crossings and obstructions. There was no evidence that, after his peril had been discovered or could have been known by the fireman or engineer, the train could have been stopped in time to have avoided injuring him. *Held*, that, whether the bell was rung and the whistle sounded or not, and whether or not the train was running in excess of ordinance speed, he was guilty of such contributory negligence as bars recovery of damages, and the humanitarian rule has no application to the case. *Ib.*

41. ———: **Ordinance Rate: Violation As Excuse: Reliance Upon Observance.** Contributory negligence is not abrogated or excused by the violation of an ordinance limiting the rate of speed a train may be run within the corporate limits of a city, nor does such violation relieve a traveler on a public street of the city to look and listen for such train as he approaches a crossing; nor where the traveler is guilty of contributory negligence in not looking, when to have looked would have been to have seen the train in time to avoid injury, has he a right to go to the jury on the theory that he might have crossed the track in safety had the train been observing the ordinance. But said rule does not abrogate the other rule that the traveler who knows of the existence of the ordinance may rely upon its observance, if he does not know it is being violated. *Ib.*
42. ———: **Humanitarian Rule: Inability to Stop Train.** Where the evidence is undisputed that the train, if it had been running at the maximum ordinance speed of twelve mile an hour, could not have been stopped in time to have avoided injuring a traveler at the railroad crossing, after his peril was discovered or discoverable, and the traveler was guilty of contributory negligence in not looking for the train, when to have looked would have been to have seen it in time to have avoided the accident by the exercise of proper care, there is no room in the case for an application of the last-chance or humanitarian rule. *Ib.*
43. ———: ———: **Obstruction by Telegraph Poles.** Testimony that a driver of an automobile cannot see a train of six coaches a half mile distant at any point within eighty feet of the track on account of telegraph poles located one hundred and seventy-five feet apart along the edge of the right of way is so unreasonable and against all common observation and experience as to be devoid of probative force. *Ib.*
44. **Contributory: Instructions: Demurrer.** If the defendant was not guilty of negligence, or if its negligence was not the proximate cause of plaintiff's injury, or if the plaintiff herself was guilty of contributory negligence as a matter of law, she has no cause to submit to the jury, and, defendant having asked a demurrer to the evidence, which was refused, no error in the instructions need be considered on appeal, for in such situation there could be no reversible error in any instructions given or refused for either party. *Waldmann v. Skrainka Const. Co., 622.*
45. ———: **Excavation in Street: Known to Plaintiff.** While a traveler on a public street or sidewalk may ordinarily presume that the way is clear and in good condition, he cannot, if he knows that the same is torn up or obstructed by public work being done thereon, go forward in reliance upon the presumption that the

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way is clear, but must exercise his faculties to see and discover the dangers he may encounter from such obstruction, and if he fails to do so and is injured thereby he is guilty of contributory negligence and cannot recover damages, although the public authorities or the contractor doing the work may also have been negligent in regard to such obstruction. *Waldmann v. Skrainka Const. Co.*, 622.

46. **Contributory: Excavation in Street: Known to Plaintiff: Ordinary Care.** In reducing the surface of an alley to proper grade, the concrete sidewalk along the street at the alley's mouth had been broken up and an excavation made ten inches deep and fifteen feet wide. The edge of the broken sidewalk, at the south side of the excavation, was jagged, "like saw teeth" three-eighths of an inch in length. There was a dim red light in the middle of the excavation, and the hole was not fenced. Plaintiff crossed over the excavation early in the evening on her way to a theatre, and saw the red light. She returned about ten o'clock, coming from the north along the sidewalk, crossed the excavation to the south side without difficulty, and as she attempted to step up onto the sidewalk her instep struck one of the projections on its edge and she was thrown down and injured. The night was dark and the red light too dim to enable her to see the projection. Held, that she had actual knowledge of the excavation, knew how deep and wide it was, and the darkness made it all the more incumbent on her to look out for dangers, including the projection, and she was guilty of such contributory negligence as prevents a recovery of damages. *Ib.*
47. ———: ———: **Darkness.** To walk into and across a hole ten inches deep and fifteen feet wide in a concrete sidewalk, of whose existence and condition the traveler has actual knowledge, in nearly absolute darkness, without being specially careful and without feeling her way as an ordinarily careful person would, is contributory negligence. *Ib.*
48. ———: ———: **Jagged Edges.** Where the traveler knew that the broken place and deep and wide hole in the concrete sidewalk, made by a contractor with the city in bringing an alley to proper grade, which she attempted to cross over on a dark night, was incomplete and unfinished work, she was put upon notice and bound to look for and anticipate dangers connected with it, including the jagged edge of the broken line of the sidewalk and the danger of tripping when her feet came in contact with its sharp projections. *Ib.*
49. **Steps To Double Flat: Repair: Duty of Landlord.** Whenever the owner of a house demises a portion of it to which access is had by way of halls, stairways or other approaches to be used in common with the owner or tenants of other portions of the same, the owner, by such transaction, retains as to the tenant the possession and control of such undemised facilities and it is his duty to keep them or to use reasonable care to keep them in safe condition for the use of the tenant in the enjoyment of his possession. Where there was a double flat house, consisting of an upper and lower story and fronted by a common one-story porch, from which a single set of steps led down to the granitoid walk, the owner of the house, having leased the two stories to different tenants from month to month, for residence purposes, retained such possession and control of the steps as made it his duty to keep them or to use reasonable care to keep them in a safe condition for the use of both tenants. *Roman v. King*, 641.

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50. ———: ———: ———: **Invitation to Use.** One who invites another to come upon his premises is bound in law to see that those premises are in such condition that the invitation may be safely accepted; and a lease, by which the landlord, by the very act of leasing them, retains the control and possession of the undemised steps leading into a double flat used for residence purposes by different tenants, is an invitation to such tenants to enter the flat by such steps, and it is his duty to so maintain them that each of the tenants can enter the flat in safety, and if he neglects to so maintain them he is liable for any injury to the tenant caused by such unsafe condition. *Ib.*
51. ———: ———: ———: **Eviction.** The refusal of a landlord to maintain entrance steps to his double flat house used by his tenants from month to month for residence purposes, in such condition that they may enter and depart in safety, is a method of wrongful eviction.* *Ib.*
52. ———: **Knowledge of Unsafe Condition: Continued Use: Contributory Negligence.** The use by a tenant of the front steps to a double flat leased to different parties from month to month for residence purposes, after knowledge of their dangerous condition, is not of itself conclusive evidence of lack of due care, since such knowledge does not require the tenant to desist from using them in a careful manner, nor render a careful use of them contributory negligence. The law does not encourage the wrongdoer to interpose his wrong as a defense against one who has suffered from its effects. The law will not compel a tenant, without good reason, to abandon her front door, the full and free use of which in safety is included in her monthly rental, and make use of a safe set of back steps. *Ib.*
53. ———: **Repair of Other Steps: Evidence.** Plaintiff sued her landlord for personal injuries due to the unsafe and rotten condition of the front entrance steps to a flat, one story of which she had leased. Some time previously the defendant had employed a carpenter to repair the back steps, and this carpenter took to defendant a note on which plaintiff had written: "All work is done right." There was no evidence connecting the paper with the subject of the suit, while the testimony of defendant shows affirmatively that there was no such connection. *Held*, that the admission of the paper in evidence was prejudicial error against plaintiff. *Ib.*
54. ———: **Meddling With Loose Step: Contributory Negligence.** For the tenant to move the loose end of a wooden step—loose because the wooden carrier is rotten—six or seven inches, and then to put it back in the position it had occupied before, or to pick it up and show it to her neighbors and then to put it back where it was before, does not constitute an act of negligence, and does not fix upon such tenant responsibility for her injury, when, subsequently, in descending the steps, said step slipped from under her foot and thereby she was thrown to the ground; and an instruction which tells the jury that such acts constitute contributory negligence which bars her recovery of damages from her landlady for such injuries is in effect a peremptory instruction to find for defendant, and is highly prejudicial to her. It is not the law that if the tenant meddles with a step leading to her leased premises in the interest of her own safety, the owner is released from all liability

NEGLIGENCE—Continued.

for negligence in creating a situation so dangerous that safety required its correction. *Roman v. King*, 641.

55. **Steps to Double Flat: Duty of Landlord and Tenant.** It is the duty of the landlord to exercise reasonable care to keep entrance steps to a double flat building in a safe condition for the use of the tenant of one of the stories and of all persons having social or business relations with her, and she is entitled to the free and constant use of the steps as a necessary adjunct to the enjoyment of the leased premises, and the law does not require her to cease that enjoyment the moment the landlord chooses to permit the steps to become dangerous, but she may continue to use them, the exercise of reasonable care to be determined in view of the extent and nature of the danger created by the owner's neglect or refusal to perform his duty, and if upon due notice or with knowledge of the dangerous condition he fails to make necessary repairs and she is injured by said unsafe condition she is entitled to recover from him her damages. *Ib.*

NEGOTIABLE INSTRUMENTS.

1. **Note: Implication of Payment.** It would be singular that a physician, actively engaged in the practice of medicine, making money in dealing in real estate, in which transactions he had continuous dealings with local banks, should not only borrow, but retain without any payments for almost ten years, considerable amounts of money from a brother, who, not shown to possess any unusual amount of property, combined the vocation of a barber with that of a druggist in a small town in another state; but these facts, though undisputed, are not substantial proof that the notes, if made, have been paid. *Lawson v. Meffert*, 337.
2. ———: **Indorsements: Other Necessary Proof: Limitations.** There is no presumption that the indorsement of a partial payment on a promissory note was made at the time it bears date; on the contrary, to remove the bar of limitations is necessary to adduce other proof than the mere production of the note with a credit thereon bearing a date which would have that effect—proof showing that the credit was actually made by the owner of the note, or by his direction at a time when the note was not barred, or, by direct evidence, that the payment was actually made by the maker at such time. *Ib.*
3. ———: ———: ———: ———: **Similarity of Handwriting.** A judgment against a deceased maker's administrator on one note for \$2950 on which a credit of \$50 bearing date twenty days before the note would otherwise have been barred by limitations, and on another for \$500 on which a credit of ten dollars bearing date twenty-three days before the note would otherwise have been barred, cannot stand where the only proof, aside from the mere production of the notes themselves, that the payments were made when dated or at any other time, was opinion evidence that there was a similarity in the handwriting of the indorsements and that of the purported maker. If there is no evidence *aliunde* when a credit is indorsed, there must be proof that the payment was, in fact, made. *Ib.*
4. ———: **Alterations: Explanations: Presumption.** Where an alteration or erasure upon a note appears suspicious—for instance,

NEGOTIABLE INSTRUMENTS—Continued.

where chemical and handwriting experts testify that erasures had been made on the face of the notes, indicated by the scratched and roughened condition of the paper; that the ink used at the point of erasure was different in composition and color from that used elsewhere on the notes, and that the effect of the erasures in one instance was to change the sum payable and in another to change the date—they demand explanation. Such changes are material alterations, and in their presence the law does not presume that they were made at or prior to the execution of the notes, but it demands that they be satisfactorily explained. *Ib.*

5. **Evidence: Admission Made In Extremis.** Admission of a statement made by the purported maker of the notes sued on at a time when he was in *extremis* is error. And a statement that "I have fixed his notes, and he will get his money," with no evidence connecting it with the notes sued on and none identifying the person referred to, even if made in a lucid interval, is inadmissible and prejudicial. *Ib.*

NOTICE.

By Publication: Two Consecutive Weeks. The statute required that the resolution authorizing a street improvement should be published in some newspaper "for two consecutive weeks; and if a majority of the resident owners of the property liable to taxation therefor shall not, within ten days from the date of the last insertion of said resolution, file with the city clerk their protest against such improvement, then the board of aldermen shall have power to cause such improvements to be made and contract therefor." The resolution was adopted on May 3rd, and was published in a weekly newspaper on May 7th and 14th, and on May 25th an ordinance requiring the improvement to be made and the contract to be entered into was adopted. *Held*, that the statute required that the resolution should be published for full two weeks, or fourteen days, and as ten days intervened between its last publication on May 14th and the adoption on May 25th of the ordinance requiring the improvement to be made and the contract to be let, the requirements of the statute were met. Where the statute requires the resolution to be published for "two consecutive weeks," and allows property owners ten days thereafter in which to protest, it is not necessary, in order to constitute two consecutive weeks, that the resolution be inserted for three weeks in the weekly newspaper, but where the resolution is inserted the second time ten days before the council passes an ordinance authorizing the improvement, that is sufficient publication. [*Overruling Munday v. Leeper*, 120 Mo. 417.] *Brunswick ex rel. v. Benecke*, 307.

OFFICERS. See *Salary and Fees*.

PARENT AND CHILD.

1. **Cancellation of Deed: Undue Influence: Burden of Proof.** The simple relation of parent and child is not sufficient to justify the cancellation of a deed or lease from the parent to the son, but in order to authorize such cancellation there must be a further showing of the exercise of undue influence by the son, or the existence of fraud practiced upon the parent by him, or that some

PARENT AND CHILD—Continued.

advantage was taken by the son of the parent's weak condition of mind; and where there is no evidence tending to show any relation of trust and confidence between the parent and son except that which exists between parent and child, the burden of showing fair dealing and the absence of undue influence does not shift to the son in her suit to set aside a conveyance of her farm to him. *Smith v. Smith*, 405.

2. **Cancellation of Deed: Undue Influence: Burden of Proof: Utmost Fairness.** Where the evidence shows that the utmost fairness characterized the dealings of a son with his mother and manifests a desire on his part to secure to her an adequate income from her farm, which she, because of old age and physical infirmities, was unable to operate, and to preserve the estate intact for himself and her other children, and further shows that, in pursuance to said desire, he took upon himself a burden that he alone of all her children was able to carry, which required the advancement of considerable sums of money and his personal attention for ten years or more before he could be reimbursed, there is no room for the contention that, in her suit to set aside the conveyance, the burden of showing fair dealing and the absence of undue influence shifted to him. *Ib.*

PARTIES TO ACTION.

1. **Deed of Trust: Suit to Foreclose: Trustee as Party.** To a suit brought against the guardian and curator to foreclose a deed of trust executed by an insane person, the trustee is not a necessary party, and a failure to make him a party in no manner affects the validity of the sale. *Sidwell v. Kaster*, 174.
2. ———: ———: **Wife as Party: Waiver.** If the divorced wife of the insane mortgagor was a necessary party to a proceeding brought against his guardian and curator to foreclose a deed of trust, the defendant should by answer or demurrer have raised the point that she was a necessary party, and having failed to do so waived the defect. *Ib.*
3. **Action on Insurance Policy: Brought by Trustee and Mortgagee: Bringing in Mortgagor.** In an action at law on a fire insurance policy brought by the trustee and mortgagee for the amount of the insurance upon the mortgaged property, it is not proper to require the mortgagor or his grantee to appear and plead to plaintiff's cause of action, since they are not only unnecessary parties, but have no interest in the controversy between the plaintiffs and the defendant insurance company. *State ex rel. Ins. Co. v. Reynolds*, 382.

PARTITION.

1. **Equitable: Improvements Made by Cotenant: Limitations.** An allowance to one tenant in common of the value of improvements made by him upon land brought into equitable partition is to be based upon the conditional and reciprocal right of the other cotenants, is not recognized at law at all but only in equity, and is governed wholly by equitable considerations, among them the maxim that he who seeks equity must do equity. The cotenant out of possession, who has received no benefit of the common estate, is entitled to offset or credit the rental value of his interest against the allowance for improvements made and taxes paid by

PARTITION—Continued.

the cotenant in possession, especially where the latter has received the rents and profits to the exclusion of his cotenants; and neither the claim for improvements nor the claim for rent is barred by the Statute of Limitations, nor does the question of limitations enter into the adjustment. *Byrne v. Byrne*, 109.

2. ———: ———: ———: **Excess of Rents.** Rents barred by the statute in an ejectment suit can only be used as a shield and not as a sword in chancery partition; only an equal amount of rental value can be allowed a co-tenant out of possession against an allowance for improvements made by a cotenant in possession, and not the excess of rents over the value of the improvements. *Ib.*
3. ———: **Improvements Made Pending Will Contest.** In an equitable partition, the devisee named in a will, annulled after being probated, should be allowed for improvements made by him in good faith pending the will contest. *Ib.*
4. ———: **Cotenant Out of Possession: Rents Claimable: Improvements.** In equitable partition the cotenant out of possession is entitled to only the rental value of his interest in the land as the land would have been without improvements made thereon in good faith by the cotenant in possession. *Ib.*
5. ———: ———: **Interest on Rents Claimable: Demand.** Where no wrong is committed in acquiring or retaining money a demand therefor is necessary in order that interest may be charged thereon, and interest can be collected only from the date of the demand. The judgment of the probate court admitting a will to probate is binding upon all the world until set aside by a suit to contest the will; and where such suit was instituted by a cotenant out of possession against a devisee of land named in the will and the will was set aside, but no demand for rents and profits was made in her petition, and she at no time pending that suit applied for a receiver or administrator *pendente lite*, or otherwise made a demand for her share of the rents, she is not entitled to interest on the rental value of her proportionate share of the land prior to the time she instituted her suit for equitable partition, but only from the date such partition suit was instituted. *Ib.*
6. ———: **Personal Property: After Final Settlement.** Where the will, duly probated, is set aside in a contest proceeding, the personal property distributed among the legatees in accordance with the direction of the will and the orders of the probate court, should be brought into hotch-pot in an equitable partition, and each heir given his proportionate share thereof, as if there had been no will, and the amounts distributed to the favored legatees should be considered as advancements, which means that no interest is to be charged thereon. But where the testator's widow has died, the amount of money distributed to her, in accordance with the will, at and prior to the final settlement in the probate court, should not be brought into hotch-pot. *Ib.*
7. ———: ———: **Effect of Final Settlement.** A final settlement made in the probate court in accordance with the directions of a will, duly probated, does not, when the will is annulled in a contest proceeding, bar an inquiry into the rights of the cotenants, in an equitable partition, to the personal property distributed in accord-

PARTITION—Continued.

ance with such final settlement; for it was made subject to be set aside and annulled in case of a successful contest of the will, and the will being set aside the amount of money, shown by said final settlement to have been distributed to the legatees, must be brought into hotch-pot, as advancements to them, and distributed among the heirs as if the testator had died intestate. *Byrne v. Byrne*, 109.

8. **Equitable: Waste: Homestead.** In the equitable partition no allowance should be made against a cotenant who cut and sold cedar timber from the homestead, in which the widow had quarantine and no assignment of dower had been made therein, the evidence showing that she received the money for which the timber was sold and that the cotenant simply acted as her agent in cutting and selling it. *Ib.*
9. ———: **Taxes.** While cotenants who took possession of estate lands devised to them by their father's will, subsequently annulled in a contest proceeding, should, in an equitable partition, be charged with rents during the time they were in possession and up to the time of the partition sale, if they continue in possession up to said sale, they should be credited with any taxes they have paid or may pay prior to such sale. *Ib.*

PASSENGER RIDING ON FREE PASS. See **Railroads.**

PEDESTRIAN. See **Streets**, 1.

PENDENTE LITE. See **Execution.**

PLEADING.

1. **Negligence: Injury in Kansas: No Pleading of Statutes.** In an action for damages for personal injuries negligently inflicted in Kansas, in which plaintiff pleads no statute or ordinance but does state a cause of action under the general law of negligence, and wherein defendant invoked no statute or other law of Kansas, the law of Missouri applies, and the case is properly tried under Missouri rules of negligence. *Hill v. K. C. Rys. Co.*, 193.
2. ———: **Humanitarian Rule: Concurrent Acts: Pleading and Instruction.** The facts constituting negligence under the humanitarian rule may be pleaded with other negligent acts in the same count of the petition, and recovery be had upon the negligence covered by the humanitarian rule, and the instruction may omit all other acts of negligence. Plaintiff is not required to prove all acts of negligence pleaded, if those proven authorize a recovery under the humanitarian rule and the instruction properly submits them. *Ib.*
3. **Departure: Negligence: Cause Under Kansas Statutes.** A petition which states the ultimate fact of a cause of action for negligent personal injuries under Sections 4218 and 4219, Revised Statutes of Missouri of 1919, also states a cause of action under Sections 7323, 7324 and 11829 of the Kansas statutes; and where the petition states a cause of action under these Missouri statutes, an amended petition in which these Kansas statutes are pleaded for the purpose of showing that under them plaintiff had a right to sue, and that they create a cause of action for negligence committed in Kansas, is not a departure. The ultimate fact of negligence being alleged in both petitions, the character

PLEADING—Continued.

of proof required, the measure of damages and the judgment to be rendered upon a finding for plaintiff are the same. *Montague v. Ry. Co.*, 288.

4. ———: **Explanatory Amendments.** A petition which states a cause of action, but states it imperfectly, may be amended so as to cure the defect. The addition by way of an amended petition of allegations which maintain, explain, fortify and strengthen the cause of action stated in the original petition, does not constitute a departure. Whether a change from law to law is a change of the cause of action depends on whether the facts essential to constitute a cause of action are the same or different in the two pleadings, rather than whether the pleader intended the one law or the other to apply. Where the original petition states the facts essential to a cause of action for damages based on unpleaded Missouri statutes, for negligent personal injuries inflicted in Kansas, an amended petition, containing the same essential allegations, to which are added others showing plaintiff's right to sue and that the same facts constitute negligence under the statutes of Kansas, which are for the first time pleaded as an amendment, is not a departure. *Ib.*
5. ———: **Amendments Liberally Allowed.** Under the Missouri statute (Sec. 1274, R. S. 1919), amplifying and liberalizing the right to amend pleadings, and limiting the right only by the sound judicial discretion of the court applicable to the facts of each particular case, the proper rule is to allow amendments and the exception to refuse them, and not to refuse them unless the opposite party will be injured by the amendment; and where the amended petition does not require a different character of evidence from that necessary to support the original petition, the measure of damages and the identity of the subject-matter are the same in both, and a judgment rendered upon either will constitute a complete bar to an action on the other, the amendment should be allowed, and not held to be a departure. *Ib.*
6. ———: **Amendment Required by Answer.** Where an amended petition is made necessary by an issue tendered in defendant's answer, filed by leave of court upon the eve of the trial, defendant is in no position to complain of an amendment which controverts or avoids the new matter set up by way of defense. *Ib.*
7. **Fraud and Deceit: Scienter: Allegation Tantamount to Knowledge.** *Scienter* means knowledge on the part of the person making representations, at the time they are made, that they are false, and in actions of fraud and deceit it is necessary to allege and prove the *scienter*; but it is not necessary to expressly allege that the defendant knew his representations upon which the action is based were false; it is sufficient if the language used is tantamount to an allegation of knowledge that they were false; it is sufficient if the petition charges that the representations were false, were made by defendant himself, and therefore necessarily known to him, that they were "knowingly" made and done for "the fraudulent purpose of deceiving the public," and especially should such allegations be held to be a sufficient plea of the *scienter* after verdict, where no demurrer to the petition was filed and its insufficiency was first raised by an objection to the introduction of testimony. *Morrow v. Franklin*, 549.

POLICE REGULATION. See **Inspection; Referendum.**

PROMISSORY NOTE. See **Negotiable Instruments.**

QUARANTINE. See **Homestead.**

RAILROADS.

1. **Negligence: Injury to Interstate Passenger: Free Pass: Stipulated Exemption.** The United States courts, in the trial in them of causes governed solely by the common law, follow their understanding of the common law, regardless of the decisions of the courts of the State in which the cause of action arose; and they have uniformly held that under the common law, irrespective of any act of Congress regulating interstate commerce, stipulations in an interstate free pass exempting a carrier from liability for personal injury to the passenger negligently inflicted, are enforceable. But under the law of this State an attempt by a common carrier, by a stipulation annexed to a free pass, to relieve itself of the consequences of its negligence, is ineffective; and where the passenger was riding on a free pass containing such a stipulation, in an interstate journey, her case, if instituted in this State, is to be determined according to the applicable local state law, unless that law has been superseded by some act of Congress regulating interstate commerce, and it has not been so superseded. *Van Zant v. Ry. Co.*, 164.
2. ———: ———: ———: ———: **Hepburn Act: Anti-Pass Regulation: Member of Family.** The Hepburn Act, fixing a penalty against a common carrier which issues an interstate free pass, "except to employees and their families," and a like penalty against any person who uses such pass, did not attempt to cover the field of damages for personal injuries negligently inflicted by the carrier upon a person riding on said pass, but the sole purpose of that part of the act was to prohibit the issuance of free transportation by interstate carriers. It did not prohibit the issuance of an interstate free pass obtained by a railroad employee for his mother, a member of his family, nor prevent her from recovering damages for personal injuries received by her, in this State, while riding, in an interstate journey, on said pass. *Ib.*
3. ———: ———: ———: ———: ———: **Carmack Amendment.** Neither the Hepburn Act nor the Carmack Amendment thereto superseded the law of this State that a stipulation attached to an interstate free pass will not relieve the carrier from damages for personal injuries, negligently inflicted in this State, upon the person using such free pass, in a suit brought in the courts of this State. The Carmack Amendment dealt with the carriage of property only. *Ib.*
4. **Corporation: Issuance of Bonds: Property Right.** The provision of a railroad company's mortgage, covering all present and subsequently acquired properties, that, upon making future extensions and improvements, it could issue other bonds equal to eighty percent of the value thereof, upon a showing that its net earnings for twelve months had been equal to twice the interest on its existing indebtedness, is a property right, and cannot be destroyed by any unreasonable subsequent legislation in the nature of a police regulation. *State ex rel. Ry. Co. v. Pub. Serv. Comm.*, 452.

RAILROADS—Continued.

5. ———: ———: **Delayed by Failure to Earn Interest: Power of Public Service Commission: Mandamus.** Section 57 of the Public Service Act forbids the Public Service Commission from granting authority to a railroad corporation to issue bonds to cover expenditures that have been incurred more than "five years next prior to the filing of an application with the Commission for the required authorization." Relator had executed a mortgage upon all its existing and after-acquired properties, which contained a provision that it could thereafter issue bonds to the extent of eighty per cent of its subsequently acquired properties, extensions and betterments, upon a showing that its net earnings for the previous twelve months were equal to twice the interest on its existing indebtedness. The extensions and betterments had been made more than five years before it applied to the Commission for authority to issue bonds to the extent of eighty per cent of their value, but the application had been delayed because the earnings had not equalled twice the annual interest charges until a short time before the application was made, and the application was denied because it was not made within five years after the expenditures were incurred, and the company brings mandamus to compel the Commission to grant the authorization. *Held*, that the five-year limitation in the statute was an impairment of the company's contract right to issue the bonds, and for that reason unconstitutional and void, unless it can be sustained on the ground that it is a reasonable police regulation, and it can be sustained on that ground only when it is shown to be in the interest, protection and promotion of the public good; and the facts do not make it apparent that the public good will in any wise be promoted by withholding from the company authority to issue the bonds, and the Commission is commanded to approve their authorization.
Held, by DAVID E. BLAIR, J., dissenting, that, the statute being void, the Supreme Court has no authority, by mandamus or otherwise, to compel the Public Service Commission to approve the authorization nor could the Commission prohibit the company from issuing the bonds; the statute having been declared void in its application to the company, the Commission has no jurisdiction to further consider the subject. *Ib*.
6. **Certiorari: To Court of Appeals: Evidentiary Facts.** In *certiorari* to a court of appeals based on conflict with prior decisions, the Supreme Court takes the evidentiary facts stated in the opinion of the Court of Appeals as the facts of the case. Where it is stated in said opinion that "there was evidence tending to show that the speed of the train was not slackened until after deceased was struck" the Supreme Court will assume that said statement is true, although an examination of the testimony might weaken the conclusions of law reached by that court. *State ex rel. Frisco Railroad v. Reynolds*, 479.
7. **Negligence: Crossing Railroad: Danger Zone: Humanitarian Rule.** The railroad ran east and west, and for about a half mile west of the station the double tracks were straight; north of them was the station house or waiting room, and south of them was a platform where passengers boarded east-bound trains; deceased, two other ladies and two children were in the station awaiting the arrival of a local train, due to stop at 9:45 a. m., but late; at about ten o'clock a through-passenger train, not scheduled to stop at the station and running several hours late and at the rate of

RAILROADS—Continued.

forty-five miles per hour, approached from the west, and hearing its whistle these five persons, supposing it to be the local train, left the station and started across the tracks for the platform, and two of the women and the two children got across, but deceased, who was just behind the others, was struck just as she stepped off the south rail of the south track; a second or two more and she would have reached a place of safety. When the train was 320 feet west of the station, the engineer saw this group of five persons leave the station and start across the tracks, and realizing they were attempting to cross he gave the brakes a "service application," which is the ordinary method of stopping a train as distinguished from an "emergency application," which slows up and stops it more quickly and which, if it had been given, would have stopped the train within the 1320 feet. The acts of the parties indicated to the engineer that they knew the train was approaching, which carried with it knowledge of the fact that it was approaching very rapidly. *Held*, that the engineer had a right to assume that deceased would stop before entering upon the south track, and the five persons were not passengers from the time they left the station, but, as to this non-stopping through train, the danger zone began, not at the doors of the station, but, practically, with the south track; *and*, the Court of Appeals, in ruling that the five persons were passengers from the moment they left the station for the purpose of boarding what they supposed was the local train and that it was the duty of the engineer from that moment to do everything he reasonably could have done to stop or slacken the speed so as to prevent the accident, contravened *Boyd v. Railway Company*, 105 Mo. 371, and later cases, and its opinion is therefore quashed. The deceased was guilty of contributory negligence, and there was nothing in the facts which brings it within the range of the humanitarian rule.

Held, by WALKER, J., dissenting, that the facts of the case of *Boyd v. Railway Company*, 105 Mo. 371, are different from those in the instant case, and that the ruling of the Court of Appeals does not contravene the decision in that case, and hence the writ of *certiorari* herein should be quashed. *State ex rel. Frisco Railroad v. Reynolds*, 479.

8. **Tort: Unlawful Speed: Wilful, Wanton and Reckless Injury.** The mere act of trainmen in moving a railroad train at a speed of forty or forty-five miles an hour across a much used public street in a densely settled portion of a city where people are likely to use said crossing at any time, without ringing the bell or blowing the whistle, is not sufficient to authorize a submission to the jury of the question whether such act was wilful, wanton, reckless and in conscious disregard of the life and bodily safety of a traveler on such street, there being no showing that the engineer or fireman intentionally ran the train upon such traveler, or saw him approaching the track or in a position of danger or likely to be in such position, or within what distance the train could have been stopped if the traveler had been so seen. *Evans v. Ill. Cent. Railroad Co.*, 493.
9. ———: ———: **Contributory Negligence.** The acts of the driver of an automobile, in attempting to cross a railroad track in broad daylight at a public crossing where he had reason to expect a train at any moment and where for a distance of fifteen feet from the track he had an unobstructed view of any train that might be approaching, without looking, and where, if he had looked, he

RAILROADS—Continued.

could have seen the train which struck him for a distance of three to six hundred feet, constituted such contributory negligence as would bar a recovery by his widow in an action based on an allegation of negligence. And although the acts of the trainmen in approaching the public crossing at an excessive speed and without blowing the whistle or ringing the bell constituted negligence on the part of the railroad company, such negligence on the part of the traveler would constitute a complete defense to an action based on an allegation of negligence. *Ib.*

10. ———: ———: **Wilful, Reckless and Wanton Injury: Definition.** Wilfulness implies intentional wrongdoing. A wanton act is a wrongful act done on purpose or in malicious disregard of the rights of others. Recklessness is an indifference to the rights of others and an indifference to whether wrong or injury is done to another. The words "conscious disregard of the life and bodily safety" of another add nothing to the words "wilful, wanton and reckless." *Ib.*
11. ———: **Contributory Negligence as Defense: Intentional Injury.** Negligence of the injured party is no defense when such injury is intentionally inflicted. But the intention of the engineer to injure a traveler at a public street crossing in a densely crowded city cannot be inferred from the mere fact that the train was run at an excessive speed without ringing the bell or sounding the whistle. Such acts constitute negligence, but they do not alone justify the inference that they were wilfully, wantonly and recklessly done. *Ib.*
12. **Contributory Negligence: Recovery for Wanton or Reckless Injury.** Where the acts of defendant constitute mere negligence, and the acts of the injured party constitute contributory negligence and a complete defense to an action for negligence, the case cannot be submitted to the jury on the theory that defendant's negligent acts constituted a wanton, wilful and reckless injury. Before a case can be submitted to the jury on the theory that defendant's acts were wanton, wilful and reckless, and therefore that the injury was intentionally inflicted, something more than acts which heretofore have been held to constitute mere negligence must be shown. But such rule does not prevent a showing in any case of acts which of themselves indicate an intentional or wanton injury, or affect the other rule that contributory negligence constitutes no defense to an action for injuries intentionally inflicted. *Ib.*
13. **Negligence: Contributory: Crossing.** The driver of an automobile, traveling on a public street twelve miles an hour towards a railroad, who, had he looked at any time after he reached a point within fifty feet of the crossing, could have seen a train approaching, but did not look, was guilty of contributory negligence. *Alexander v. Frisco Ry. Co.*, 599.
14. ———: ———: ———: **Looking in Wrong Direction.** Near the railroad track were some bill boards and trees which obstructed a southward view of the railroad track of a traveler on an intersecting public street, until he had passed them and was within fifty feet of the track, and from there on there was nothing to prevent him seeing an approaching train except the telegraph poles, which were about one hundred and seventy-five feet apart, which to a man

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traveling in an automobile, the traveler testified, would obstruct a view of a passenger train of six cars for a half mile; after passing the bill boards, which were eighty feet from the track, he did not look southward until his automobile, traveling twelve miles an hour, was within ten or fifteen feet of the track; when he was twenty-seven feet from it he could have seen a train coming from the south for a distance of a half mile, but he did not see or hear the train until he was within ten or fifteen feet of the track, which was then too close to stop his automobile before the long train, an hour behind schedule and running from twenty-five to thirty-five miles an hour, would have reached the crossing, and his only chance therefore was to go ahead, but in trying to cross he was struck and injured. The reason he did not look southward for an approaching train after passing the bill boards was that a gentleman riding with him called his attention to some one who was standing north of the street near the track and was hallowing to him, apparently, and this attracted his attention northward and before he ceased to look in that direction his automobile had run sixty-five or seventy feet, which brought him within twelve or fifteen feet of the track. He was intimately familiar with the crossings and obstructions. There was no evidence that, after his peril had been discovered or could have been known by the fireman or engineer, the train could have been stopped in time to have avoided injuring him. *Held*, that, whether the bell was rung and the whistle sounded or not, and whether or not the train was running in excess of ordinance speed, he was guilty of such contributory negligence as bars recovery of damages, and the humanitarian rule has no application to the case. *Alexander v. Frisco Railroad Co.*, 599.

15. **Negligence: Contributory: Ordinance Rate: Violation As Excuse: Reliance Upon Observance.** Contributory negligence is not abrogated or excused by the violation of an ordinance limiting the rate of speed a train may be run within the corporate limits of a city, nor does such violation relieve a traveler on a public street of the city to look and listen for such train as he approaches a crossing; nor where the traveler is guilty of contributory negligence in not looking, when to have looked would have been to have seen the train in time to avoid injury, has he a right to go to the jury on the theory that he might have crossed the track in safety had the train been observing the ordinance. But said rule does not abrogate the other rule that the traveler who knows of the existence of the ordinance may rely upon its observance, if he does not know it is being violated. *Ib.*
16. ———: ———: **Humanitarian Rule: Inability to Stop Train.** Where the evidence is undisputed that the train, if it had been running at the maximum ordinance speed of twelve miles an hour, could not have been stopped in time to have avoided injuring a traveler at the railroad crossing, after his peril was discovered or discoverable, and the traveler was guilty of contributory negligence in not looking for the train, when to have looked would have been to have seen it in time to have avoided the accident by the exercise of proper care, there is no room in the case for an application of the last-chance or humanitarian rule. *Ib.*
17. ———: ———: ———: **Obstruction by Telegraph Poles.** Testimony

that a driver of an automobile cannot see a train of six coaches a half mile distant at any point within eighty feet of the track on

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account of telegraph poles located one hundred and seventy-five feet apart along the edge of the right of way is so unreasonable and against all common observation and experience as to be devoid of probative force. *Ib.*

RATIFICATION.

Deed: Lease: Cancellation. Where a voluntary deed to a farm by a mother to her children was made subject to a cotemporaneous lease to one of them for ten years at an annual rental, her demand and acceptance of a part of the rental is an affirmation of the contract with said grantee and lessee, subject to the correction of mutual mistakes, and cannot be avoided as to him because four of the six children refused to accept the deed. *Smith v. Smith*, 405.

RECEIVERS. See **Corporations.**

REFERENDUM.

1. **Legislative Enactment: Power of Legislature to Prevent.** The General Assembly cannot prevent the reference of a legislative act to the people by referendum petition for their approval or rejection, by inserting in the act a section that the enactment is necessary for the immediate preservation of the public peace, health and safety, when it is not such in fact, nor by inserting such words in the act inhibit the court from determining whether it is subject to reference. [Per WOODSON, J.; JAMES T. BLAIR, C. J., and WALKER, GRAVES and ELDER, JJ., concurring; HIGBEE and DAVID F. BLAIR, JJ., dissenting.] *State ex rel. Pollock v. Becker*, 660.
2. **Constitutional Provision: Adopted from Another State: Interpretation Also Adopted: Exception.** The general rule, general in that it is the frequent expression of the courts, is that where a statute or constitutional provision has been borrowed from another state, which prior to its adoption in the borrowing state had received a construction by the highest court of that state, the presumption is that the borrowing state adopted it in the light of such construction; but this is only a rule of construction, and there are exceptions to it as ancient as the rule itself, one of which is that where the courts of the adopting state are clearly of the opinion that the construction by the courts of the initial state is erroneous, or that its application would lead to a denial of a substantial right, such foreign construction will not be controlling. [Per GRAVES, J.; BLAIR, C. J., and WALKER, J., concurring.] *Ib.*
3. **Ousting Justice of Peace.** A legislative act which removes eight justices of the peace in one city, cuts down the number of justices and constables and provides for the appointment of others by the Governor, is not a bill for the immediate preservation of the public peace, health or safety, nor, as is shown by current history, of which the courts take judicial notice, were they enacted for any such purpose. And it is against all reason that the reference of such acts to the people can be prevented by inserting in them a section declaring that their enactment is necessary for the immediate preservation of the public peace, health and safety. [Per GRAVES, J.; BLAIR, C. J., and WALKER, J., concurring.] *Ib.*
4. **Exception: Exercise of Police Power: Judicial Question.** The clause of the Constitution which does not require a reference of

REFERENDUM—Continued.

legislative acts necessary for the immediate preservation of the public peace, health or safety is an exception to the otherwise universal reservation by the people of the power of referendum, and includes only those certain, definite and unquestioned phases of the police power which, in their very nature, may be and usually are emergent; and as the courts exercise jurisdiction to determine whether a legislative act is a valid exercise of the police power, it is also a judicial question whether a certain act, which attempts to cut off its reference to the people, is a valid exercise of the police power. [Per BLAIR, C. J.; WALKER and GRAVES, JJ., concurring.] *State ex rel. Pollock v. Becker*, 660.

5. **Legislative Finding: Conclusiveness.** The Constitution does not say that a legislative act shall be exempt from the referendum if the General Assembly shall declare it to be necessary for the immediate preservation of the public peace, health or safety, but the exemption is made to depend on the fact that the act is so necessary. [Per BLAIR, C. J.; WALKER and GRAVES, JJ., concurring.] *Ib.*
6. **Exercise of Police Power: Judicial Question: Legislative Finding.** The question of fact whether a trade or calling is of such a nature as to render it subject to regulation or to particular regulations under the police power, is strictly a judicial question; and the court will hold invalid any legislative act which it finds does not touch the public good in such a way as to justify regulation of the calling or the particular regulation attempted, and it will do that in the face of the fact that the regulatory act involves a legislative finding that existing facts justify the attempted regulation. [Per BLAIR, C. J.; WALKER and GRAVES, JJ., concurring.] *Ib.*
7. **Widening Police Power: Conclusiveness of Legislative Finding.** If a declaration in a legislative act that it is necessary for the immediate preservation of the public peace, health and safety is conclusive upon the courts, then the result is that Section 57 of Article IV of the Constitution empowers the Legislature to widen and extend the police power to include callings and regulations to which it could not have been extended prior to the adoption of said section, and to remove from the realm of judicial inquiry every question of fact pertaining to the scope and extent of proper exercise of the police power; and, furthermore, it empowered the Legislature to defeat the reference of any and all bills, whether an attempted exercise of the police power or otherwise, by the mere inclusion of such a declaration in the bill, however false in fact it may be. [Per BLAIR, C. J.; WALKER and GRAVES, JJ., concurring.] *Ib.*
8. **Legislative Error: Corrected by Another Error.** That part of said Section 57 pertaining to the reference to the people of laws enacted by the Legislature was designed to correct legislative errors; and if the Legislature errs by passing a bad act, it cannot cure that error by adding thereto another error, false on its face, that the act is necessary for the immediate preservation of the public peace, health and safety. [Per BLAIR, C. J.; WALKER and GRAVES, JJ., concurring.] *Ib.*
9. **Legislative Finding: Effect Upon Referendum and Courts.** If a legislative declaration inserted in a law that its enactment is neces-

REFERENDUM—Continued.

sary for the immediate preservation of the public peace, health and safety is conclusive upon the question of its referendum and prevents its reference to the people, it would likewise be conclusive upon the courts when they are called upon to consider the validity of the act as a proper and reasonable exercise of the police power. It is conclusive neither on the referendum nor upon the court. [Per BLAIR, C. J.; WALKER and GRAVES, JJ., concurring.] *Ib.*

10. **Police Regulation: Question of Fact.** Courts have power to pass upon questions of fact in determining whether police regulations are valid or invalid. [Per BLAIR, C. J.; WALKER and GRAVES, JJ., concurring.] *Ib.*
11. **Adopted from Oregon: Prior Construction.** The fact that the referendum provision of our Constitution was borrowed from Oregon, and that the highest court of that state had decided, before it was adopted here, that a declaration inserted by the Legislature in an act declaring that the enactment is necessary for the immediate preservation of the public peace, health and safety is conclusive upon the courts and prevents the reference of the act to the people by petitions sufficiently signed, will not compel the acceptance of such construction by the courts of this State, because it is not in harmony with the spirit and purpose of our Constitution as declared in the initiative and referendum provision, and in such case the rule of foreign construction does not apply. The construction of the borrowed constitutional provision by the courts of the initial state is not binding, but only persuasive, and will not be followed where the courts of the adopting state are clearly of the opinion, as the Supreme Court is in this case, that such construction was erroneous and if followed will result in the denial of a substantial right. [Per WALKER, J.; BLAIR, C. J., and GRAVES, J., concurring.] *Ib.*
12. **Purpose: Legislative Defeat.** The purpose of the referendum provision, expressed in an adopted constitutional amendment, was to provide an efficient method of checking and regulating legislative power, by providing that all legislative acts, except those necessary for the immediate preservation of the public peace, health and safety, may be referred to the people for their approval or rejection; and to hold that the Legislature may, in spite of the clear language used, determine, not only the extent to which the reserved power shall be used, but whether it may be exercised at all, would be to rule that the Legislature can violate the spirit of the provision and destroy its purpose. [Per WALKER, J.; BLAIR, C. J., and GRAVES, J., concurring.] *Ib.*
13. ———: ———: **Justice of Peace: Unlimited Exceptions.** If the Legislature may except from the operation of the referendum provisions of the Constitution acts abolishing justices of the peace, clerks and constables in designated townships and providing for the appointment of their successors, by simply declaring in the acts that their enactment is necessary for the immediate preservation of the public peace, health and safety, then a like exception may be effected by inserting said declaration in any act, regardless of the absurdity of its application, and thus the constitutional power intended to be reserved will be completely destroyed. [Per WALKER, J.; BLAIR, C. J., and GRAVES, J., concurring.] *Ib.*

REFERENDUM—Continued.

14. **Justice of Peace: Public Peace, Health and Safety: Immediate Preservation: Absurdity.** Acts which apply to only one city in the State cannot be said to be "public" in the sense that word is used in the referendum clause of the Constitution; and if their purpose, as is apparent from their face, is to effect a change in the personnel in the offices of justices of the peace, clerks and constables in the townships of said city, and to define their duties and powers, it would be to violate reason, which is the life of the law, and to uphold an absurdity, to say they are necessary for the "immediate preservation" of the public peace, or the public health or the public safety, for those words imply an imminent danger, an impelling necessity, public disorders, and an unwholesome sanitary condition of the community at large. [Per WALKER, J.; BLAIR, C. J., and GRAVES, J., concurring.] *State ex rel. Pollock v. Becker*, 660.
15. **Legislative Acts: Presumption of Right Action: Invasion: Judicial Interference.** Every intendment should be made in favor of the propriety of legislative action; but it is firmly fixed in American government that it is the province and duty of the judicial department to say what the law is, and that duty is more imperative under modern constitutions which do not invest exclusive legislative power in the legislature, but divide it between the legislature and the people, and place upon the court, in a proper case, the duty to determine whether the legislature's acts constitute an invasion upon the powers which the people in their Constitution have reserved to themselves. If a legislative act purports to be for the preservation of the public peace, health and safety, and its words and subject-matter have no relation to those subjects, and an analysis of it demonstrates that it is a palpable invasion of the powers reserved by the people, the courts will so decide, and preserve the constitutional right of referendum. [Per WALKER, J.; BLAIR, C. J., and GRAVES, J., concurring.] *Ib.*
16. **Peace and Safety: Legislative Determination.** The mandate of the Constitution, coming directly from the people, is superior to the will of the Legislature; and while the Legislature, being invested with law-making power, must, in the first instance, decide whether an act is necessary for the immediate preservation of the public peace, health or safety, its determination that the necessity exists if in fact without substantial basis, is not final or conclusive. But if the act purports to have been adapted to meet an emergency which palpably, from its face, does not exist, it becomes the duty of the courts to take jurisdiction and give effect to the constitutional intent and purpose. [Per ELDER, J.; BLAIR, C. J., and WALKER and GRAVES, JJ., concurring.] *Ib.*
17. ———: **Construction by Oregon Court.** The ruling of the Supreme Court of Oregon, from which the initiative and referendum section of our Constitution was borrowed, that a declaration placed in a bill by the Legislature that its enactment is necessary for the immediate preservation of the public peace, health and safety is conclusive, is not binding upon the Supreme Court of this State, although such ruling was made before the constitutional section was adopted in this State. While such foreign construction is persuasive and entitled to respectful consideration, it is not binding, and will not be followed if the courts of the adopting state are of the opinion that it is erroneous. [Per ELDER, J.; BLAIR, C. J., and WALKER and GRAVES, JJ., concurring.] *Ib.*

REFERENDUM—Continued.

18. ———: ———: **Removal of Justice of Peace.** A declaration in a legislative act, abolishing in one township the offices of eight justices of the peace and constables, who from the record are presumed to be properly and efficiently discharging their official duties, and providing for the immediate appointment of other justices and constables, that its enactment is necessary for the immediate preservation of the public peace, health and safety, is not conclusive on the courts, and is not sufficient to prevent the reference of said act to the people for their approval or rejection. [Per ELDER, J.; BLAIR, C. J., and WALKER and GRAVES, JJ., concurring.] *Ib.*
19. ———: ———: **Construction by Oregon Court: Binding.** When the people of Missouri adopted the referendum amendment from the Constitution of Oregon they adopted the construction which had previously been given it by the Supreme Court of that state just the same as if that construction had been written into the body of the amendment; and that court having ruled, prior to the adoption of the amendment in this State, that a declaration written into the body of a legislative act that its enactment is necessary for the immediate preservation of the public peace, health and safety is conclusive and final on the question of necessity, such ruling is binding on the courts of this State and compel a like ruling from them. [Per HIGBEE, J., dissenting.] *Ib.*
20. ———: ———: **Legislative Power: Coordinate and Independent Department.** The Constitution has solemnly vested the legislative power in the General Assembly, which is an independent and coordinate department of the government, answerable only to the people for the execution of the powers delegated to it, and the remedy for any abuse of that power, by fraud or trickery, is the ballot. Besides, a legislative act, which contains a section declaring that its enactment is necessary for the immediate preservation of the public peace, health and safety, may be submitted to the direct vote of the people by an initiative petition, so that there is no foundation for the suggestion that the Legislature, by inserting such a declaration in an act, may, by fraud and trickery, destroy the referendum or prevent legislation by the people. [Per HIGBEE, J., dissenting.] *Ib.*
21. ———: ———: **Oregon Construction.** When one state borrows a constitutional provision from another and the highest court of that state has authoritatively construed the provision prior to its adoption by such other, such provision is to be held as having been adopted with the construction thus previously put upon it. The initiative and referendum amendment to the Missouri Constitution was borrowed from the Constitution of Oregon, and the decision of the Supreme Court of that State, made before its adoption here, that a declaration in an act of the Legislature that its enactment is necessary for the immediate preservation of the public peace, health and safety is final and conclusive on the court, if not absolutely binding on the Supreme Court of Missouri, is persuasive authority of the highest character. [Per DAVID E. BLAIR, J., dissenting.] *Ib.*
22. ———: ———: **Weight of Authority: On Principle.** The decided weight of authority is to the effect that the existence of the necessity for a legislative act is a matter of legislative determination. But independent of decided cases, and on principle, the courts

REFERENDUM—Continued.

are and should be bound by the declaration in an act passed by the Legislature that its enactment is necessary for the immediate preservation of the public peace, health and safety. [Per DAVID E. BLAIR, J., dissenting.] State ex rel. Pollock v. Becker, 660.

REFORMATION. See **Mistake**.

REMARKS OF COUNSEL. See **Attorneys**.

RENTS. See **Partition**.

REPRESENTATIONS. See **Fraud and Deceit**.

REVENUE MEASURES. See **Inspection**.

SALARIES AND FEES.

1. **Mandamus: Payment of Salary.** Mandamus is an appropriate remedy to compel a public official, whose duty it is to pay another official his salary, to pay such salary, where its amount is fixed by law; for then no discretion is left as to the amount, and where the only question is what is the amount the law fixes as the salary, it is purely a legal one. State ex rel. Koehler v. Bulger, 441.
2. **County Engineer: For Ex Officio Duties Only.** The words of the statute (Sec. 10556, R. S. 1909) providing that in counties containing fifty thousand inhabitants, etc., "the county surveyor shall be *ex officio* county highway engineer, and his salary as surveyor and *ex officio* county highway engineer shall be not less than two thousand dollars and not more than three thousand dollars, as fixed by the county court," in view of the history of the statute preceding such proviso, has reference to *ex officio* duties and *ex officio* salary only; the proviso did not mean that the county court could fix the salary of the officer both as county surveyor and *ex officio* county highway engineer at less than the statutory salary of the surveyor, but the term "as surveyor and *ex officio* county highway engineer" had reference to the office of engineer, and not to that of surveyor. Ib.
3. ———: ———: **Amendment of 1919.** Likewise the amendment to such statute made in 1919 (Sec. 10787, R. S. 1919) providing that in such counties "his salary as surveyor and *ex officio* county highway engineer shall be not less than three thousand dollars and not more than five thousand dollars, as may be fixed by the county court," meant that the salary of the *ex officio* county highway engineer, for the performance of the duties of that office, should be not less than three thousand dollars, in addition to his salary as county surveyor. The statute did not mean that the court could fix his salary for the performance of the duties of both offices at not less than three nor more than five thousand dollars, but it meant that the court could fix his salary for his *ex officio* duties as highway engineer at not less than three nor more than five thousand dollars, and did not give the court power to fix his salary as surveyor at all. In such counties, he is entitled to at least three thousand dollars a year, in addition to his statutory salary as county surveyor. Ib.

SALE PENDENTE LITE. See **Execution**.

SCIENTER. See **Fraud and Deceit**.

SOFT DRINKS. See *Inspection*.

STARE DECISIS.

Different Case: Second Appeal in Same Case. A mandamus suit brought in the Supreme Court to compel the Missouri Dental Board to issue a license to relator is not a second appeal, but a new case. But even on second appeal, after the case has been tried on the basis of the ruling on the first appeal, the court reserves the right to correct its former ruling. What was said in the former suit of *State ex rel. Wolfe v. Missouri Dental Board*, 282 Mo. l. c. 303, to the effect that the board had a discretion to withhold an annual license to a registered dentist was an inadvertence, and related to the issuance of the certificate of registration, or to a trial for the revocation of the certificate and the license, and in so far as it may be understood as a holding that the board is invested with a discretion to withhold a license to a registered dentist should be corrected, and is corrected upon a full review of the whole statute. *Held*, by JAMES T. BLAIR, C. J., dissenting, with whom DAVID E. BLAIR, J., concurs, that the decision in the former case of *State ex rel. Wolfe v. Missouri Dental Board*, 282 Mo. 292, is well supported by Section 12636, Revised Statutes 1919, and is sound law. *State ex rel. Wolfe v. Dental Board*, 520.

STATE DENTAL BOARD. See *Dentists*.

STATUTES AND STATUTORY CONSTRUCTION.

1. **Election Ballots: Evidence in Criminal Prosecution: Statutory Prohibition.** Section 5403, Revised Statutes 1919, declaring that ballots shall "in no way be used or any information disclosed that would tend toward showing who voted any ballot," while invalid in so far as it relates to cases of election contests, is not otherwise prohibited by the Constitution, and forbids the use of ballots as evidence in a criminal prosecution. In *re Oppenstein*, 421.
2. ———: ———: **Ballots as Evidence: Statutory Authority.** In so far as a statute (Sec. 5403, R. S. 1919) conflicts with the Constitution it is without force, for the Legislature has no authority to authorize what the Constitution prohibits. *Ib*.

STATUTES CITED AND CONSTRUED.

Revised Statutes 1919.

Section 911, see page 361.	Section 4218, see page 296.
505, see page 218.	4219, see page 296.
507, see page 32.	5403, see pages 438, 439.
525, see page 221.	7593, see page 22.
1162, see page 297.	9287, see page 336.
1163, see page 297.	10466, see page 461.
1274, see pages 305, 306.	10782, see page 449.
1787, see page 449.	10784, see page 451.
1970, see page 248.	10787, see pages 450, 451.
2143, see page 671.	11041, see pages 450, 451.
2266, see page 270.	12636, see pages 538, 542.
2688, see page 670.	ch. 47, see page 675.
2689, see page 671.	ch. 112, see page 535.
2923-2943, see page 671.	ch. 117, see page 446.
4217, see page 296.	art. 6, ch. 98, see page 446.

STATUTES CITED AND CONSTRUED—Continued.

Revised Statutes 1909.

Section 21, see page 126.	Section 6708, see pages 10, 12, 15.
391, see page 590.	6710, see page 15.
499, see page 189.	9411, see pages 312, 314,
514, see page 189.	319.
520, see page 189.	10551, see pages 446, 447,
537, see page 32.	449.
1099, see page 573.	10553, see pages 447, 449.
1131, see pages 572, 573.	10556, see pages 447, 448,
1133, see page 572.	449, 450.
2119, see page 374.	10714, see page 447.
2394, see pages 123, 124.	10737, see pages 448, 450,
2964, see page 517.	451.
2965, see page 517.	11327, see page 447.
2966, see page 517.	art. 5, ch. 102, see page 446.
5425, see page 482.	

Revised Statutes 1899.

Section 3620, see pages 9, 10, 587.

Revised Statutes 1889.

Section 4533, see page 594.
 4558, see pages 591, 592.
 5439, see pages 10, 539, 593.
 5544, see page 189.

Revised Statutes 1855.

Section 30, ch. 32, p. 363, see pages 261, 270.

Laws 1921.

p. 402, see page 475.

Laws 1919.

p. 379, see page 466.
 p. 381, see page 475.
 p. 634, see page 450.
 p. 636, see page 449.

Laws 1917.

p. 252, see page 530.
 p. 254, sec. 5487, see pages 532, 534.
 p. 256, sec. 5489, see pages 531, 534.
 p. 257, sec. 5491, see pages 531, 533, 535.
 p. 256, sec. 5492, see page 533.
 p. 263, sec. 5495d, see page 534.

Laws 1909.

p. 755, see page 451.

Laws 1907.

p. 301, see page 10.
 p. 401, see page 446.
 p. 420, see page 448.

STATUTES CITED AND CONSTRUED—Continued.

Laws 1895.

p. 185-c, see pages 9, 10.

p. 186, see page 592.

Laws 1892-93.

p. 22, see page 9.

STREETS.

1. **Automobile and Pedestrian: Relative Right to Street: Duties to Each Other.** A pedestrian, equally with the operator of an automobile, has the right to be upon and use the traveled part of a public street instead of the sidewalk, and it is not as a matter of law the duty of a pedestrian, while walking along the traveled part of a highway, to turn about constantly and repeatedly to observe the possible approach of vehicles from the rear. On the contrary, such a pedestrian may assume that the operator of the automobile will exercise ordinary care in keeping a lookout; that under ordinary conditions he will be discovered by such operator; and that the operator, as he approaches, will slow down and give an audible signal with his horn; but he is also required to be on the lookout for automobiles, and to exercise ordinary care for his own protection, according to the circumstances of the situation in which he finds himself. *McKenna v. Lynch*, 16.
2. **Improvement: According to Established Grade: Specification.** A resolution adopted by the board of alderman reciting that "the surface of the roadway when said work is completed shall be at the established grade thereof, all according to plans, profiles and specifications therefor filed by the proper officer with the city clerk of said city," and profiles showing the cuts and fills necessary to bring to the established grade the part of the street to be graded and paved, duly filed, sufficiently comply with the requirements of the statute (Sec. 9411, R. S. 1919) requiring the resolution to include and describe the work of bringing the street to the established grade. *Brunswick ex rel. v. Bgnecke*, 307.
3. ———: **Notice to Begin Work: Waiver: Completion of Work.** Where the ordinance provided that the street improvement should begin within one week from the delivery to the contractor of written notice, said notice can be waived, and where no notice is given the time for completing the work is to be counted from the date he actually began work. *Ib.*
4. ———: **Not Completed Within Required Time: Void Tax Bill.** Where the ordinance provided that the street improvement should begin within one week from the delivery to the contractor of written notice, and be fully completed within sixty days, and no notice was given, but he began work on June 28th and completed the improvement on November 10th, a period of 135 days, no extension being granted or requested, the tax-bills issued to the contractor in payment for the improvement were void. *Ib.*
5. ———: ———: **Provisions for Interference.** Time is of the essence of a contract requiring a street improvement to be completed within a specified time, and material; and where no cause appears for the delay and for aught that appears the work was needlessly delayed, any provision in the contract that days lost on account of injunction suits, bad weather and strikes should not be counted, not being invoked or if invoked wholly inapplicable, does not relieve

STREETS—Continued.

against the requirement for a completion of the improvement within the prescribed time. *Brunswick ex rel. v. Benecke*, 307.

6. **Dedication of: By Grantor's Conveyance.** A dedication of a street to public use may be made in a deed from one individual to another, if sufficiently explicit in terms to indicate the grantor's purpose. Where the owner sells property within the limits of a city, and in the deed bounds it by certain designated streets, not only does the grantee acquire an easement by the grant, but the deed constitutes an offer of the use declared. *St. Louis v. Clegg*, 321.
7. ———: ———: **Call for Street: Estoppel: Available to Public.** While the rule is that an estoppel by deed, including an implied covenant, can operate only in favor of the grantee or his privies in estate, and estoppel *in pais* can operate only when representations have been made to a legal person, who has relied upon them to the extent that it would be inequitable to allow them to be withdrawn, a call for a street in a deed from one individual to another is more than a mere description, for it is an implied covenant that there is such a street, and where such individual has accepted the deed and acted on it in reliance upon such covenant the general public can avail itself of an estoppel in his favor. *Ib.*
8. ———: ———: ———: **Aided by Other Facts.** A deed from the owner of land in a city to an individual grantee designated Glades Avenue as the northern boundary of the property sold and ended the description by metes and bounds as "on the south line of said avenue;" ten days thereafter a survey, made twenty years previously by the grantor's husband, which declared Glades Avenue to be the northern boundary of the property and designated it as a proposed highway, was filed, and the presumption is reasonable that it was filed at said owner's instance; said survey remained on record unchallenged for seven years before the suit was brought to open and widen said avenue, and the grantee in said deed testified that Glades Avenue had been open for more than ten years and that he had several times driven through it. *Held*, that the deed, aided by the other facts, constituted a dedication to public use of that portion of the owner's property designated therein as Glades Avenue, and a formal acceptance was unnecessary. *Ib.*
9. ———: ———: **Subsequent Revocation.** After the dedication of land to a public use by the deed of the owner, an agreement between the owner and grantee, in which the former, for a consideration, agrees to sell to the latter ground described in the deed as a street, will not effect a revocation of the grant, nor be construed as indicative of another purpose than that expressed in the deed. And after the dedication has become absolute, the grantor cannot change its character by a deed of another lot to another grantee in which she describes the avenue so dedicated as a private street. *Ib.*
10. ———: **Fee in Dedicator.** The fact that at common law the fee in the soil over which a public highway is established remains in the owner does not affect its common law dedication to public use, which is absolute until the highway is vacated. *Ib.*
11. ———: **Opening Street: Damages.** Where the owner of property has parted with the fee, she is not entitled to damages for its

STREETS—Continued.

appropriation by the city in a proceeding to open and widen a street over the same. *Ib.*

12. ———: **Nominal Damages.** Where the area included within a proposed public street is burdened in favor of adjacent lots with easements in the nature of a street, public or private, the owner, upon condemnation for the formal establishment of a highway thereon, is entitled to recover only nominal damages. *Ib.*
13. **Boulevard: Shifting Cost by Widening Street: Cancellation of Tax Bills: Corruption.** Charter provisions requiring the expense of opening a boulevard to be borne in part by the city and in part by property abutting thereon cannot be evaded by the enactment of an ordinance for widening a street but in fact establishing a boulevard, and thereby shifting the city's part of the expense of its construction upon property not subject to assessment for boulevard purposes; and where the city's part of such expense has by the subterfuge of enacting a widening ordinance been shifted to property not abutting on the street and therefore under the charter not subject to assessment to pay the cost of constructing a boulevard in such street, the owner of such property may maintain a suit to cancel the tax bills; and such a suit may be maintained without an allegation or showing that there was bribery or corruption in connection with the enactment of the widening ordinance and the proceedings thereunder. [Following *Albers v. St. Louis*, 268 Mo. l. c. 357 et seq.] *Albers v. St. Louis*, 543.
14. ———: ———: ———: **Notwithstanding Judgment in Condemnation: Collateral Attack.** Notwithstanding the fact that the circuit court had rendered judgment in the condemnation proceeding establishing the boulevard and approving the assessments against the owner's property, such owner can maintain a suit to cancel the tax bills issued to pay such assessments, if they were made contrary to charter provisions. *Ib.*
15. **Negligence: Contributory: Excavation in Street: Known to Plaintiff.** While a traveler on a public street or sidewalk may ordinarily presume that the way is clear and in good condition, he cannot, if he knows that the same is torn up or obstructed by public work being done thereon, go forward in reliance upon the presumption that the way is clear, but must exercise his faculties to see and discover the dangers he may encounter from such obstruction, and if he fails to do so and is injured thereby he is guilty of contributory negligence and cannot recover damages, although the public authorities or the contractor doing the work may also have been negligent in regard to such obstruction. *Waldmann v. Skrainka Const. Co.*, 622.
16. ———: ———: ———: ———: **Ordinary Care.** In reducing the surface of an alley to proper grade, the concrete sidewalk along the street at the alley's mouth had been broken up and an excavation made ten inches deep and fifteen feet wide. The edge of the broken sidewalk, at the south side of the excavation, was jagged, "like saw teeth" three-eighths of an inch in length. There was a dim red light in the middle of the excavation, and the hole was not fenced. Plaintiff crossed over the excavation early in the evening on her way to a theatre, and saw the red light. She returned about ten o'clock, coming from the north along the sidewalk, crossed the excavation to the south side without difficulty,

STREETS—Continued.

and as she attempted to step up onto the sidewalk her instep struck one of the projections on its edge and she was thrown down and injured. The night was dark and the red light too dim to enable her to see the projection. *Held*, that she had actual knowledge of the excavation, knew how deep and wide it was, and the darkness made it all the more incumbent on her to look out for dangers, including the projection, and she was guilty of such contributory negligence as prevents a recovery of damages. *Waldmann v. Skrainka Const. Co.*, 622.

17. **Negligence: Contributory: Excavation in Street: Darkness.** To walk into and across a hole ten inches deep and fifteen feet wide in a concrete sidewalk, of whose existence and condition the traveler has actual knowledge, in nearly absolute darkness, without being specially careful and without feeling her way as an ordinarily careful person would, is contributory negligence. *Ib.*
18. ———: ———: ———: **Jagged Edges.** Where the traveler knew that the broken place and deep and wide hole in the concrete sidewalk, made by a contractor with the city in bringing an alley to proper grade, which she attempted to cross over on a dark night, was incomplete and unfinished work, she was put upon notice and bound to look for and anticipate dangers connected with it, including the jagged edge of the broken line of the sidewalk and the danger of tripping when her feet came in contact with its sharp projections. *Ib.*

SUPERSEDEAS. See **Execution.**

SUBROGATION.

1. **Action at Law: Equitable Defense: Action on Insurance Policy: To Plaintiff's Right.** Where the trustee and mortgagee brought action on a fire insurance policy, which contained a rider to the effect that, when the company shall pay the loss to the trustee or mortgagee and claim no liability to the mortgagor existed, it shall be legally subrogated to the rights of the party to whom the payment is made, said rider did not purport to destroy the plaintiffs' legal action on the policy as their interest might appear, and a plea of its provisions in defendant's answer, which also denied liability on the policy, did not convert the action at law into a suit in equity. *State ex rel. Ins. Co. v. Reynolds*, 382.
2. ———: ———: ———: ———: **No Payment.** Where the trustee and mortgagee bring suit on a fire insurance policy, which contains a clause that the company, upon paying the loss to them, may be subrogated to all their rights under any securities executed by the mortgagor and held by them, a plea asking that defendant be so subrogated is unavailing, and so far as the plaintiffs are concerned states no equity, if the defendant has neither paid plaintiffs' demand nor paid the amount thereof into court for their benefit. There can be no subrogation to a plaintiff's rights until his demand has been paid. *Ib.*

SURVEYOR. See **County Engineer.**

TAXES AND TAXATION.

1. **Equitable Partition.** While cotenants who took possession of estate lands devised to them by their father's will, subsequently annulled in a contest proceeding, should, in an equitable partition, be

TAXES AND TAXATION—Continued.

charged with rents during the time they were in possession and up to the time of the partition sale, if they continue in possession up to said sale, they should be credited with any taxes they have paid or may pay prior to such sale. *Byrne v. Byrne*, 109.

2. **Payment: Duty of Life Tenant: Duty of Life Tenant's Grantee.** The payment of taxes upon improved and productive land is a charge upon the life estate, and it is the duty of the owner of such estate, whether the life tenant or his grantee be the owner, to pay the taxes and protect the interest of the remaindermen. *Mathews v. O'Donnell*, 235.
3. **Sale: Deed to Life Tenant.** The purchase of land at its sale for taxes, by the life tenant or by the life tenant's grantee, inures to the benefit of the remaindermen, and operates only as a payment of the taxes. Such purchaser occupies a fiduciary relation to the remaindermen, and is bound to exercise every reasonable precaution to preserve the property intact for transmission to them upon the termination of the life estate. *Ib.*
4. ———: ———: **Future Disposition: Purchaser With Notice: Deliberate Plan to Defraud Remaindermen.** Not only the life tenant who purchases land at a tax sale, but all persons who take title from him with notice of his violation of his fiduciary relation to the remaindermen, are trustees *ex maleficio*; and the record of title showing he had only a life estate is constructive notice to his grantee, and the tax deed informs such grantee that the life tenant had suffered the land to be sold for delinquent taxes which the law required him to pay. But the facts of this case show actual notice, and also a deliberate plan to deprive the remaindermen of their estate, by suit and sale for taxes. *Ib.*
5. **Surplus Money Paid to Life Tenant: Order of Court: Estoppel.** Where the life tenant, occupying a fiduciary relation to the remaindermen and under obligation to protect their estate, caused or allowed a suit for taxes to be instituted for the purpose of covinously defeating their title, his motion, sustained by the court, directing the sheriff to pay over to him the surplus money in his hands arising from the tax sale, will not estop them from claiming title. Such payment bars a renewal of any claim to the surplus fund, but it was not *res adjudicata* as to the remaindermen's title. *Ib.*

TRIALS.

1. **Argument to Jury.** Where counsel for plaintiff in their argument to the jury went outside the record and made unduly inflammatory remarks, but the trial court, upon objection, directed the jury not to consider them, and the size of the verdict indicates that they were not influenced thereby, the judgment will not be reversed. *Kilburn v. Ry. Co.*, 75.
2. ———: **Reading From Medical Book.** Counsel for plaintiff, in cross-examining physicians offered as witnesses by defendant, used several medical books, and got one of the physicians to admit that a certain passage in one of them was correct doctrine and to say that he would adopt it as an expression of his own views, and this passage counsel for plaintiff, in his argument, was reading to the jury when the trial judge stopped him and told him

TRIALS—Continued.

- he had no right to read from the book, as it had not been offered in evidence. *Held*, that the conduct of counsel was not reversible error. *Kilburn v. Ry. Co.*, 75.
3. **Juror: Prejudice: No Challenge or Objection.** Where the juror on his *voir dire* examination was not challenged, and no objection was made to his competency or qualifications, an objection first appearing in the motion for a new trial that he was prejudiced against appellant cannot be considered on appeal. And in this case had the juror been timely challenged on the facts disclosed by the affidavits filed in support of the motion for a new trial, such challenge should have been overruled. *Pietzuk v. K. C. Rys. Co.*, 135.
 4. **Misconduct of Court.** In the face of previous irritating conduct of counsel, the trial court is not to be condemned for attempting, by asking questions of the jury, to get at the real issues and facts of the case. And where a witness had testified that the little girl hesitated when she got upon the street railway track, the court, in assuming in his next inquiry, over objection, that she had stopped, especially where the witness subsequently stated she was standing still, was not guilty of misconduct. *Hill v. K. C. Rys. Co.*, 193.
 5. **Action on Insurance Policy; Subrogation: Equitable Defense: Concealment of Real Owner: Knowledge of Company: Action at Law.** Property was conveyed to Martin and the deed recorded, and a fire insurance policy was issued to him as the insured; immediately thereafter, by an unrecorded deed, Martin conveyed to Krupnick, who was in fact the beneficial owner, and who executed certain notes to one of the plaintiffs and secured them by a deed of trust to the other as trustee, and said trustee and the payee of the notes bring suit on the policy. Defendant, by answer, prayed that Martin and Krupnick be made parties defendant, and pleaded that the policy was void because of the concealment from defendant of lack of title in Martin and of the interest of Krupnick. Being made parties, Martin disclaimed any beneficial interest and averred that the property was conveyed to him for the purpose of having it conveyed to Krupnick; Krupnick pleaded that he was the owner of the real estate, subject to the deed of trust; that defendant had full knowledge of all the facts before and after said policy was written, and with such knowledge received and retained the premium, and that by reason of such knowledge the policy was not void. In its counterplea, defendant denied it had said knowledge. *Held*, that these issues were purely legal in their nature and triable by a jury; and that the action on the policy was not converted into a suit in equity, by a further plea by defendant that it was subrogated, by the terms of the policy, to the mortgagee's right to the notes executed by Krupnick, for such plea did not purport to destroy Krupnick's right of action, and even if it had it would have been unavailing, because defendant had not paid plaintiff's demand. *State ex rel. Ins. Co. v. Reynolds*, 382.
 6. **Fraud and Deceit: Several False Representations: Proof of One.** Where several false representations are charged to the defendant, any one of which is sufficient to constitute an action for fraud and deceit, substantial proof of any one of them is sufficient to carry the case to the jury. *Morrow v. Franklin*, 549.

TRIALS—Continued.

7. ———: ———: **Expressions of Opinion: Refusal to Withdraw From Jury.** Statements made by defendant, the president and director of a trust company, sued for fraud and deceit based on false statements as to the value of stock sold to plaintiff, that the company could continue indefinitely to pay a four per cent quarterly dividend, that if plaintiff bought its stock at \$190 per share he could sell it in six months at a profit or advanced price, that the stock would by the next January be worth \$300 per share, and that the company could be liquidated in twelve months and the sum of \$200 per share paid to the stockholders, if they stood alone, would be mere expressions of opinion, but made in connection with representations as to the value of the stock and the condition of the company and its assets and made for the purpose of strengthening those representations and as a part and parcel of them, it was not error for the court to refuse to give instructions withdrawing them from the jury's consideration; and in view of the fact that the court in other instructions told the jury what statements were statements of fact and not mere opinions, and further told them explicitly what representations would authorize a verdict for plaintiff, in which no mention was made of these statements, the refusal to withdraw them, even if considered mere expressions of opinion, was at most harmless error. *Ib.*

TRUSTS AND TRUSTEES.

1. **Tax Suit: Trust Estate: Sale of Legal Estate.** Where the will, fairly construed, contemplated that the executors should divide the property between the widow and two sons, and that one of the sons should hold his brother's share until he became of age: there is nothing to show when said brother became of age; the will does not show when it was made; the testator died in 1883 and the administration of the estate closed in 1887; in 1891, after the death of the wife, suit for taxes was brought against both brothers, they were personally served, and in their answers asserted they were the owners of the land, and made no claim to a trust estate, it will be *held*, in a suit to quiet title, that the title passed to the purchaser at the sheriff's sale under the tax judgment, and that a subsequent purchaser from said brothers took nothing by his deeds. *Marley v. Land & Mfg. Co.*, 221.
2. ———: ———: **Estoppel.** Defendants in a tax suit, after filing their answer in which they assert they are the owners, will not be heard, on the ground of estoppel; to urge that the judgment in the tax suit was void and did not bind them because the property was held by one of them as trustee for the other. Inconsistent positions cannot be taken where they work injury, and the purchasers at the tax sale had a right to rely upon defendant's answer filed in the tax suit, in which they alleged they were the owners. And a subsequent purchaser from said defendants stands in no better position than they do. *Ib.*

UNDUE INFLUENCE. See **Parent and Child.**

VERDICT.

1. **Contrary to Greater Weight.** Where the record is devoid of anything which could give rise to a logical conclusion that the jury were prejudiced, or corrupt, or grossly negligent, or that they disregarded the instructions of the court, their verdict cannot on

VERDICT—Continued.

appeal be set aside as contrary to the greater weight of the evidence, although only three witnesses testified to the same facts showing defendant was guilty of the negligence charged, and six for defendant testified to the contrary, only one of whom identified plaintiff as the man who was injured. *Pietzuk v. K. C. Rys. Co.*, 135.

2. **Excessive: \$15,000.** Plaintiff, in attempting to board a street car from an elevated platform, was thrown to the street, thirty feet below. He sustained a broken jaw, a broken chest, his legs were hurt, and five or six teeth were knocked out; there was a fracture at the base of the skull, which produces a dizziness in the head, and makes it dangerous for him to work about machinery or upon a scaffold; the bones of the jaw are not in perfect apposition, the teeth being out of line; there is an irritability in the spinal cord, and his symptoms are nervous dizziness and occasional headaches; his physician's bill was \$185, and he was earning \$572 a year prior to the accident, was then thirty-three years of age, and two years and a half afterwards went to work again, and his chances of complete recovery and of permanent impairment are about equal. *Held*, that a verdict for \$15,000 is excessive by \$4,000. *Ib.*
3. **Alienation: Excessive Verdict.** There is no scale by which the damages of a wife can be graduated with certainty in an alienation suit, although her husband separated from her on March 31st and died on June 9th. Where the evidence shows a malicious and unlawful interference by a sister in the marital relations between her brother and the plaintiff; that upon his separation from plaintiff the defendant sister persistently and successfully kept them apart, although she knew they were anxious to become reconciled, and succeeded in preventing a reconciliation or even communications between them up to the time of his death, a verdict for ten thousand dollars actual and five thousand punitive damages will not be held to be excessive. *Hollinghausen v. Ade*, 362.

WAIVER.

Action on Insurance Policy: Authority of Agent: Facts upon Certiorari.

Upon *certiorari* to the Court of Appeals, in which it was ruled that the defendant insurance company was charged with whatever knowledge was acquired by its inspector a few weeks after the policy was issued, it will not be held by the Supreme Court that the facts shown in evidence were not sufficient to establish such knowledge or the inspector's authority to waive any concealment by the insured of the true ownership of the insured property, where, upon the partial facts recited in the opinion of the Court of Appeals, no ground for quashing its judgment appears, the entire evidence being presumably before the Court of Appeals, and only such portions of its can be considered by the Supreme Court as appear from its opinion. *State ex rel. Ins. Co. v. Reynolds*, 382.

WASTE. See **Partition**.

WILLS.

1. **Attestation: Recitals: Witness to Mark.** The statute requiring that "every will shall be in writing, signed by the testator, or by some person, by his direction, in his presence; and shall be attested by two or more competent witnesses subscribing their names to the

WILLS—Continued.

will in the presence of the testator" does not require that a statement of all these things shall appear on the face of the will, or that the word "attest" or that anything whatever shall be written thereon other than the name of the testator and the names of the witnesses. If the maker signed the will by making his mark, and three other competent persons signed it as "witness to mark," and testify that the mark was made before they signed it, and that he declared it to be his last will and they signed it at his request as witnesses and in his presence, it was sufficiently attested. *Nook v. Zuck*, 24.

2. **German Testator: Read to Him in English.** The testator could, with difficulty, speak a few words in English and make his wants known in making purchases, but could not write or read the English language, and said he could not talk it well enough to dictate his will in English; the scrivener could not understand German, but the testator told two witnesses who could understand both German and English just what different amounts of money he wished to give to each of his children and what land he wished to devise to a certain daughter, and those witnesses translated and repeated his requests to the scrivener in English, who wrote them down in English, and after the will was completed it was read to him in English, and he thereupon signed it and asked the witnesses to attest it, but one of them before he signed it talked with him and he told them the paper was his last will and testament and wanted them to sign it; and the evidence is clear that he comprehended the extent of his property and the disposition he wished to make of it, and the oral testimony is all to the effect that the instrument disposed of it as he desired. *Held*, that the instrument was his will and testament. *Ib.*
3. **Undue Influence: Peremptory Instruction.** Where there is no evidence of coercion having been exercised at or prior to the time the will was executed, and the only approach to proof of undue influence is the testimony of parties in interest that the testator subsequently to the execution of the will cried and said they made him change his will, it is the duty of the court to direct a verdict for the proponents. *Ib.*
4. **Testamentary Incapacity: Old Age: Paralysis.** Where the only evidence of testator's testamentary incapacity is that he was between eighty-five and eighty-six years of age, and had for some time been paralyzed and unable to walk or use his hands, but his digestion and assimilation were good, and the paralysis had no tendency to affect his mind, there is no evidence of mental incapacity, and a peremptory instruction directing a verdict for proponents on that issue is proper. *Ib.*
5. **Annulment: Rights of Legatees.** When a will is finally set aside by the judgment of the Supreme Court, all rights of the legatees under the will cease, and their rights to the property devised by it must be determined as if the testator had died intestate, except as to such prima-facie rights as they acquired by the formal probate of the will in the first instance in the probate court. *Byrne v. Byrne*, 109.
6. —: **Unassigned Widow's Dower: Quarantine.** Upon the annulment of the will of a householder, his widow, to whom dower was never assigned, was entitled, as her quarantine, to the pos-

WILLS—Continued.

session of the mansion house and the messuages thereto belonging during her life, and to all rents and profits thereof, as if no will had existed. And where the home place consisted of 210 acres, of which ninety acres was devised to a son and the balance to the widow for life, the widow, upon the annulment of the will, was entitled to the possession of said ninety acres, as well as to the balance of the homestead, and during her life, no dower having been assigned, none of the testator's heirs had any legal claim to the rents or profits thereof. *Byrne v. Byrne*, 109.

7. **Annulment: Unassigned Widow's Dower: Quarantine: Obtained By Widow's Undue Influence.** Although the appellate court sustained the verdict of the jury setting aside the will on the ground that it was the result of undue influence exercised by the widow upon the testator, she cannot be deprived of her dower and quarantine in the home place, for when the will was annulled the result was that the testator died without a will and intestate, and his heirs and widow were restored to their rights at law, and among the rights regained by the widow was her right to dower and quarantine. *Ib.*
8. **——: Personal Property: After Final Settlement.** Where the will, duly probated, is set aside in a contest proceeding, the personal property distributed among the legatees in accordance with the direction of the will and the orders of the probate court, should be brought into hotch-pot in an equitable partition, and each heir given his proportionate share thereof, as if there had been no will, and the amounts distributed to the favored legatees should be considered as advancements, which means that no interest is to be charged thereon. But where the testator's widow has died, the amount of money distributed to her, in accordance with the will, at and prior to the final settlement in the probate court, should not be brought into hotch-pot. *Ib.*
9. **Will Contest: Substituted Pages: Finding of Jury Conclusive.** After the will was written it was submitted to the testatrix, who said it was what she wanted. Two neighbor women were called in and testatrix showed them the instrument, told them it was her will, expressed satisfaction with it and asked them to witness it, and this they did. On cross-examination of these witnesses it was developed that they were unable to identify positively sheets one and two of the instrument, and were able so to identify only sheet three on which their signatures appeared; but the draftsman testified he was present when the will was signed and that it was then in the exact condition in which it was when put in evidence at the trial, and there was no evidence of fraud, but there was ample evidence, direct and otherwise, that the instrument was her genuine will. *Held*, that there was no ground for so much as a suspicion that the will signed by testatrix was not the same document put in evidence at the trial, but the question being nevertheless submitted to the jury the finding sustaining the will is conclusive on appeal. *Elam v. Phariss*, 209.
10. **——: Mistake: Legal Advice as to Husband's Curtesy.** Testatrix gave written directions for the contents of her will, and after it was written and submitted to her she caused it to be re-written in order to correct a minor error. Being re-written and submitted to her, she read it and said it contained the exact provisions she desired to be incorporated in it, and it was then signed and witnessed, and there is no real contention that she did not

WILLS—CONTINUED.

know its contents. There was no mental, physical or educational impediment to her understanding it, and there was no evidence of fraud, coercion or undue influence. Giving the fee in remainder to two children, it devised to her husband a life estate in her real estate, in lieu of all his "other rights, interests or claims" in her estate, and provided that out of the income of the property he should use \$150 a year, until \$1000 should be so used, to purchase a home for another child, the contestant. The draftsman testified that the matter of the husband's rights were discussed, and that he advised her that a surviving husband was entitled to a life estate in one-half of his wife's property. *Held, first*, there being no evidence to show how she held the property devised and it being the law that property may be so conveyed that the husband's curtesy is excluded and the wife's estate one of which she can dispose by will, the instrument cannot be held not to be her will on the ground that her husband was entitled by the curtesy to a life estate in her lands, and that the attempt to impose a charge upon it in favor of contestant was therefore unavailing, and testatrix received and acted upon unsound advice concerning her husband's marital rights in her lands, for in order to so hold it would be necessary to assume that her title was so taken that his curtesy was not excluded; and, *second*, even though the assumption were permissible, the mistake was not such as would authorize a setting aside of the will. *Ib.*

11. ———: **Mistake as to Legal Effect of Provisions.** A mistake of law in the mind of the testator, who is of sound mind and free from undue influence, or a mistake as to the legal effect of provisions contained in the will, will not invalidate the will. Where testatrix was advised by an attorney that her surviving husband would have a curtesy equal to a life estate in one-half of her property, and, in lieu of all his "other rights, interests and claims," she devised to him a life estate charged with the obligation that he should pay to one of her daughters one thousand dollars, such advice, even though erroneous, and such provision in the will, even though she may not have understood its legal import, are not sufficient for refusing probate to her will. *Ib.*

WRIT OF ERROR.

Erroneous Judgment: No Supersedeas: Execution: Title of Purchaser.

Where the judgment of the circuit court in an action for debt was for plaintiff and was not void, but only erroneous, and on writ of error without a *supersedeas* staying execution was reversed, but before said writ issued execution was issued and levied on defendant's land, the purchaser at such sale, if a stranger to the proceeding, takes the title, which is in no way impaired by such reversal. *Sidwell v. Kaster*, 174.

Rules for the Government of the Supreme Court of Missouri.

REVISED TO APRIL 12, 1921.

Rule 1.—Chief Justice, Duty. The Chief Justice shall be elected for a term of one and three-sevenths years, and shall superintend matters of order in the courtroom.

Rule 2.—Motions to be Written, etc. All motions shall be in writing, signed by counsel and filed of record. At least twenty-four hours notice of the filing of same, unless herein otherwise provided, shall be given to the adverse party, or his attorney.

Rule 3.—Argument of Motions. No motion shall be argued unless by the direction of the court.

Rule 4.—Diminution of Record, Suggestion after Joinder in Error. No suggestion of diminution of record in civil cases will be entertained after joinder in error, except by consent of the parties.

Rule 5.—Application for Certiorari. Whenever *certiorari* is applied for to correct a record, an affidavit shall be made thereto of the defect in the transcript sought to be supplied and at least twenty-four hours notice of such application shall be given to the adverse party or his attorney.

Rule 6.—Reviewing Instructions. To enable this court to review the action of the trial court in giving and refusing instructions it shall not be necessary to set out the evidence in the bill of exceptions; but it shall be sufficient to state that there was evidence tending to prove the particular fact or facts. If the parties disagree as to what fact or facts the evidence tends to prove, then the testimony of the witnesses shall be stated in narrative form, avoiding repetition and omitting immaterial matter.

Rule 7.—Bills of Exceptions in Equity Cases. In equity cases the entire evidence shall be embodied in the bill of exceptions; provided it shall be sufficient to state the legal effect of documentary evidence where there is no dispute as to its admissibility or legal effect; and provided further that parole evidence shall be reduced to a narrative form where this can be done and its full force and effect be preserved.

Rule 8.—Presumptions in Support of Bills of Exceptions. In the absence of a showing to the contrary, it will be presumed as a matter of fact that bills of exceptions contained all the evidence applicable to any particular ruling to which exception is saved.

Rule 9.—Making up Transcripts. Clerks of courts in making up transcripts of the record for the Supreme Court, unless an exception is saved to the regularity of the process or its execution, or to the acquiring by the court of jurisdiction in the cause, shall not set out the original or any subsequent writ or the return thereof, but in lieu of same shall simply note the dates respectively of the issuance and execution of the summons.

If any pleading be amended, the clerk in making out the transcript will only insert therein the last amended pleading and will set out no abandoned pleading or part of the record not called for by the bill of exceptions; nor shall any clerk insert in the transcript any matter touching the organization of the court or any continuance, motion or affidavit not made a part of the bill of exceptions.

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Rule 10.—“Appellant” and “Respondent:” What They Include. Whenever the words appellant and respondent appear in these rules they shall be taken to mean and include plaintiff in error and defendant in error and other parties occupying like positions in a case.

Rule 11.—Abstracts in Lieu of Transcript, When Filed and Served. Where the appellant shall, under the provisions of Section 1479, Revised Statutes 1919, file a copy of the judgment, order or decree in lieu of a complete transcript, he shall deliver to the respondent a copy of his abstracts at least thirty days before the cause is set for hearing, and in a like time file ten copies thereof with our clerk. If the respondent is not satisfied with such abstract, he shall deliver to the appellant an additional abstract at least fifteen days before the cause is set for hearing, and within like time file ten copies thereof with our clerk. Objections to such additional abstract shall be filed with our clerk within ten days after service of such abstracts upon the appellant, and a copy of such objections shall be served upon the respondent in like time.

If the respondent desires to make objections to the consideration of any question because appellant's abstract of the record fails to show the timely filing or the overruling of the motion for new trial or in arrest of judgment, or that the ruling on any such motion was excepted to, or that the bill of exceptions was duly signed or filed, or that the appeal was duly taken, such objections and the reasons therefor shall be served in writing on the appellant or his counsel, fifteen days before the day on which the cause is docketed for hearing, or within fifteen days after the abstract is served. Any such objections not so specified shall be deemed waived and will not be considered by the Court. After service of such objections and reasons appellant shall have ten days within which to perfect his abstract of the record by filing in this Court a certified copy of so much of the record proper or bill of exceptions as will show the true entries, orders or rulings with respect to which the sufficiency of the abstract of the record is challenged by respondent. [Adopted as an amendment to Rule 11, December 29, 1920.]

Rule 12.—Abstracts: When Filed and Served. Where a complete transcript is brought to this court in the first instance, the appellant shall deliver to the respondent a copy of his abstract of the record at least thirty days before the day on which the cause is set for hearing, and file ten copies thereof with our clerk not later than the day preceding the one on which the cause is set for hearing. If the respondent desires to file an additional abstract he shall deliver to the appellant a copy of same at least five days before the cause is set for hearing and file ten copies thereof with our clerk on the day preceding that on which the cause is to be heard.

Rule 13.—Abstracts: What They Shall Contain. The abstracts mentioned in Rules 11 and 12 shall be printed in fair type, be paged and have a complete index at the end thereof, which index shall specifically identify exhibits where there are more than one, and said abstracts shall set forth so much of the record as is necessary to a complete understanding of all the questions presented for decision. Where there is no controversy as to the pleadings or as to deeds or other documentary evidence it shall be sufficient to set out the substance of such pleadings or documentary evidence. The evidence of witnesses shall be in narrative form except when the questions and answers are necessary to a complete understanding of the testimony. Pleadings and documentary evidence shall be set forth in full when there is any question as to the former or as to the admissibility or legal effect of the latter; in all other respects the abstract must set forth a copy of so much of the record as is necessary to be consulted in the disposition of the assigned errors.

If in any case any matter which should properly be set forth in the abstract as a part of the record proper, shall appear in the abstract as a part of the bill of exceptions, or vice-versa, such matter shall be considered and treated as if set forth in its proper place, and all objections on account thereof shall be deemed waived, unless the other party shall, within fifteen days after the service of such abstract upon him, specify such objections and the reasons therefor in writing and serve the same upon the opposing party or his counsel; and in the event such objection be so made, the other party may within ten days from the service of such written objection upon him or his counsel, correct his abstract so as to obviate such objection, if under the facts as shown by the record proper or the bill of exceptions in the trial court, such correction can truthfully be made. [Adopted as an amendment to Rule 13, December 31, 1920.]

Rule 14.—Printed Transcripts. A printed and indexed transcript duly certified by the clerk of the trial court may be filed instead of a manuscript record, and in all cases printed, indexed and uncertified copies of the entire record, filed and served within the time prescribed by the rules for serving abstracts, shall be deemed a full compliance with said rules and dispense with the necessity of any further abstracts.

Rule 15.—Briefs: What to Contain and When Served. The appellant shall deliver to the respondent a copy of his brief thirty days before the day on which the cause is set for hearing, and the respondent shall deliver a copy of his brief to the appellant at least five days before the last named date, and the appellant shall deliver a copy of his reply brief to the respondent not later than the day preceding that on which the cause is set for hearing, and ten copies of each brief shall be filed with the clerk on or before the last named date.

All briefs shall be printed. The brief for appellant shall distinctly allege the errors committed by the trial court, and shall contain in addition thereto: (1) a fair and concise statement of the facts of the case without reiteration, statements of law, or argument; (2) a statement, in numerical order, of the points relied on, with citation of authorities thereunder, and no reference will be permitted at the argument to errors not specified; and (3) a printed argument, if desired. The respondent in his brief may adopt the statement of appellant; or, if not satisfied therewith, he shall in a concise statement correct any errors therein. In other respects the brief of respondent shall follow the order of that required of appellant. No brief or statement which violates this rule will be considered by the court.

In citing authorities counsel shall give the names of the parties in any case cited and the number of the volume and page where the case may be found; and when reference is made to any elementary work or treatise the number of the edition, the volume, section and page where the matter referred to may be found shall be set forth. [As amended and adopted October 23, 1917.]

Rule 16.—Failure to Comply with Rules 11, 12, 13 and 15. If any appellant in any civil case fail to comply with the rules numbered 11, 12, 13, and 15, the court, when the cause is called for hearing, will dismiss the appeal, or writ of error; or, at the option of the respondent continue the cause at the cost of the party in default.

Rule 17.—Costs: When Allowed for Printing Abstracts and Records. Costs will not be allowed either party for any abstract filed in lieu of a complete transcript under Section 1479, R. S. 1919, which fails to make a full presentation of the record necessary to be considered in disposing of all the questions arising in the cause. But in cases

brought to this court by a copy of the judgment, order or decree instead of a complete transcript, and in which the appellant shall file a printed copy of the entire record as and for an abstract, costs will be allowed for printing the same.

Where a manuscript record has been or may be filed in this court, a reasonable fee for printing an abstract of the record or the entire record in lieu of an abstract may be taxed as costs upon the written stipulation of both parties to that effect. The affidavit of the printer shall be received in cases where costs may properly be taxed for printing, as prima-facie evidence of the reasonableness thereof; and objections thereto may be filed within ten days after service of notice of the amount of such charge.

Rule 18.—Service of Abstracts and Briefs. Delivery of an abstract or brief to the attorney of record of the opposing party shall be deemed a delivery to such party under the foregoing rules, and the evidence of such delivery must be by the written acknowledgement of such opposing party or his attorney or the affidavit of the person making the service, and such evidence of service must be filed with the abstract or brief.

Rule 19.—Service of Abstracts and Briefs in Criminal Cases. Attorneys for appellants in criminal cases in which transcripts have been filed in the office of the clerk sixty days before the day the cause is docketed for hearing, shall, at least thirty days before the day of hearing, file in the office of the clerk of this court a printed statement containing apt references to the pages of the transcript, with an assignment of errors and brief of points and an argument, and serve a copy thereof upon the Attorney-General, and thereupon the Attorney-General shall, fifteen days before the day of hearing, serve defendant or his counsel with a copy of his statement and brief.

When a criminal case shall be advanced on the docket the court shall designate the time for filing statements and briefs.

When such transcript has been filed in this court fifteen days before the first day of the term at which such case is set for hearing, the appellant or plaintiff in error shall file his statement, brief and assignments of error five days before the first day of such term, and the Attorney-General shall, on or before the first day of the term, file his brief and statement.

Hereafter no statement or brief shall be filed in a criminal case out of time, nor will counsel who violate this rule be heard in oral argument unless for a good cause shown on motion theretofore filed and ruled on before the day set for the hearing of the case.

When appellants have been allowed to prosecute their appeal as poor persons by the trial court, counsel will be permitted to file typewritten statements and briefs. In cases where the transcript has been filed thirty days before the day on which the cause is docketed, counsel for appellant shall file their statements, briefs and assignments of error fifteen days before the hearing, and the Attorney-General his brief and statement five days before the hearing.

Rule 20.—Taking Record from Clerk's Office. No member of the bar shall be permitted to take a record from the clerk's office.

Rule 21.—Motions for Rehearing. Motions for rehearing must be accompanied by a brief statement of the reasons for a reconsideration of the cause, and must be founded on papers showing clearly that some question decisive of the case, and duly submitted by counsel, has been overlooked by the court, or that the decision is in conflict with an express statute, or with a controlling decision to which the attention of the court was not called through the neglect or inadvertence of counsel; and the question so submitted by counsel and overlooked by the court, or the statute with which the decision con-

dicts, or the controlling decision to which the attention of the court was not called, as the case may be, must be distinctly and particularly set forth in the motion, otherwise the motion will be disregarded. Such motion must be filed within ten days after the opinion of the court shall be delivered, and notice of the filing thereof must be served on the opposite counsel. After a cause has been once reheard and the motion for rehearing overruled either in division or *En Banc* no further motion for rehearing or motion to set aside the order overruling the motion for rehearing, by the same party, will be entertained by the court or filed by the clerk.

Rule 22.—Extension of Time. Hereafter in no case will extension of time for filing statements, abstracts and briefs be granted, except upon affidavit showing satisfactory cause.

Rule 23.—Notice to Adverse Party. A party, in any cause, filing a motion either to dismiss an appeal or writ of error, or to affirm the judgment, shall first notify the adverse party or his attorney of record, at least twenty-four hours before making the motion, by telegram, by letter, or by written notice, and shall on filing such motion, satisfy the court that such notice has been given.

Rule 24.—Transfers to Court En Banc. A motion to transfer a cause under the provisions of the Constitution from either division to Court *En Banc* must be filed within ten days after the final disposition of the cause by the division, and notice of such motion shall be given as provided in Rule 23.

Rule 25.—Return of Original Writs. Original writs or other process issued by either division of the court, or by any judge in vacation, may be made returnable to and disposed of by such division, or the Court *En Banc*, as such division or judge in vacation may order.

Rule 26.—Assignment of Motions in Civil Causes. All motions and matters in civil causes which have not been assigned by the Court *En Banc* to a division for final determination, upon the record, shall be presented to, heard and determined by the Court *En Banc*. All matters in civil causes which have been assigned to a division shall be presented to and heard and determined by such division.

Rule 27.—Assignment of Criminal Causes. All criminal causes, and matters pertaining thereto, shall be heard and determined by Division Number Two.

Rule 28.—When Appeal is Returnable: Certificate of Judgment: Transcript. Where appeals shall be taken or writs of error sued out, the appellant shall file a complete transcript or in lieu thereof a certificate of judgment as provided by Section 1479, Revised Statutes 1919, within the time provided by said section and the date of the allowance of the appeal and not the time of filing the bill of exceptions after the appeal is granted, shall determine the term to which such appeal is returnable; and when the appellant for any reason cannot or does not file a complete transcript, he shall file within the time allowed by said Section 1479 a certificate of judgment and may thereafter file a complete transcript and an abstract of the record, or simply an abstract of the record. And neither the fact that this court has heretofore held that the return term of the appeal is to be determined by the date of the filing of the bill of exceptions, nor the fact that for any reason a complete transcript could not be filed in time for the return term, shall be taken as an excuse, but in all such cases the appellant shall file a certificate of the judgment as when required by said Section 1479, Revised Statutes 1919.

Rule 29.—Oral Arguments. The time allowed for oral argument and statement shall be an hour and ten minutes for appellant or plaintiff in error, or relator, in original proceedings, and fifty minutes for respondent or defendant in error or respondent in original proceedings.

Rule 30.—Letters, etc., to Court. All motions, briefs, letters or communications in any wise relating to a matter pending in this court must be addressed to the clerk, who will lay them before the court in due course. Hereafter any letter or communication relating directly or indirectly to any pending matter, addressed personally or officially to any judge of this court, will be filed with the case and be open to the inspection of the public and opposing parties.

Rule 31.—Record Matters on Appeal. Hereafter an appellant, filing here a certified copy of the order granting an appeal, need not abstract the record entries showing the steps taken below to perfect such appeal. If the abstract state the appeal was duly taken, then absent a record showing to the contrary, by respondent, it will be presumed the proper steps were taken at the proper time and term.

Hereafter no appellant need abstract record entries evidencing his leave to file, or the filing of, a bill of exceptions. It shall be sufficient if his abstract state the bill of exceptions was duly filed. The burden is then on respondent to produce here the record showing the contrary to be the fact, if he make the point.

Rule 32.—Granting Original Writs. No original remedial writ, except *habeas corpus*, will be issued by this court in any case wherein adequate relief can be afforded by an appeal or writ of error, or by application for such writ to a court having in that behalf concurrent jurisdiction.

Rule 33.—Procedure as to Original Writs. Oral arguments will not be granted on applications for original remedial writs; and before such writs shall issue, the applicant therefor shall give not less than five days' notice thereof to the adverse party, or his attorney. Such notice shall be in writing, accompanied by a copy of the application for the writ, and the suggestions in support of same. The adverse party may file in this court suggestions in opposition to the issuance of the writ, a copy of which he shall, before filing, serve on the applicant. Whenever the required notice would, in the judgment of the court, defeat the purpose of the writ, it may be dispensed with. On final hearing printed abstracts and briefs shall be filed in all respects as is required in appeals and writs of error in ordinary cases. Motions for reconsideration of the court's action in refusing applications for original writs shall not be filed.

Rule 34.—Certiorari to Courts of Appeals. No writ of *certiorari* shall be granted to quash the judgment of a Court of Appeals on the ground that such court has failed or refused to follow the last controlling decision of the Supreme Court, unless the applicant for such writ shall give all parties to be adversely affected, or their attorneys of record, at least five days' notice of such application; and the applicant shall, in a petition of not exceeding five pages, concisely set out the issue presented to the Court of Appeals and show wherein and in what manner the alleged conflicting ruling arose, and shall designate the precise place in our official reports where the controlling decision will be found. Said petition shall be accompanied by a true copy of the opinion of the Court of Appeals complained of, a copy of the motion for rehearing or to transfer the cause to this court, a copy of the ruling of the Court of Appeals on said motion, and suggestions in support of the petition not to exceed six printed typewritten pages.

The notice to the party to be adversely affected shall be printed or typewritten, accompanied by a true copy of the petition and all exhibits and suggestions in regard thereto. The party to be adversely affected may file, on or before the date fixed by the notice, suggestions of not more than five printed or typewritten pages stating the reasons why such writ should not issue.

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